FILED
NOV - 8 1995
OFFICE OF THE CLERK

No. 95-738

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION, PETITIONER

v.

ROBERT D. RAPAPORT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 12 U.S.C. 1818(b), Congress authorized federal banking agencies to issue administrative orders requiring parties who are affiliated with regulated institutions to cease and desist from, among other things, violating written regulatory conditions or agreements with the agency. The law further provides that such orders may contain provisions that require the institution-affiliated party to take "affirmative action" to correct conditions resulting from the violation. The questions presented are:

1. Whether a federal banking agency may order an affiliated party to comply with a written agreement to pay money only if the agency establishes that the party was "unjustly enriched" by violating the agreement or that the violation involved reckless disregard for the law, a regulation, or a prior agency order.

2. If so, whether the term "unjustly enriched" in 12 U.S.C. 1818(b)(6)(A)(i) is strictly limited by its historical or "common law" meaning.

3. Whether the court of appeals erred in explicitly refusing to accord any deference to one agency's interpretation of Section 1818(b), in a case arising before that agency, on the ground that the same statute also provides cease-and-desist authority to three other federal banking agencies.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Department of the Treasury, Office of Thrift Supervision, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 59 F.3d 212. The opinion of the Acting Dircector of the Office of Thrift Supervision (App., *infra*, 26a-86a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1995. On October 4, 1995, the Chief Jus-

tice extended the time within which to file a petition for a writ of certiorari to and including November 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 8(b) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(b), provides in pertinent part as follows:

> **§ 1818. Termination of Status as Insured Depository Institution.**
>
> **(b) Cease-and-desist proceedings**
>
> (1) If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe

or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

* * * * *

(6) **Affirmative action to correct conditions resulting from violations or practices.** The authority to issue an order under this subsection and subsection (c) of this section which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—

(A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—

(i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or

(ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

(B) restrict the growth of the institution;

(C) dispose of any loan or asset involved;

(D) rescind agreements or contracts;

(E) employ qualified officers or employees (who may be subject to approval by the appropriate Federal banking agency at the direction of such agency); and

(F) take such other action as the banking agency determines to be appropriate.

* * * * *

STATEMENT

In 1984, a new savings association, Great Life Savings Association, applied to the Federal Savings and Loan Insurance Corporation (FSLIC) for federal insurance of its depositors' accounts. App., *infra*, 2a. The Federal Home Loan Bank Board (FHLBB), which was the governing body of the FSLIC, approved Great Life's application. In accordance with an FHLBB regulation, and as a condition to its approval, the FHLBB required respondent, who planned to own approximately 70% of Great Life's stock, to enter into an agreement with the FSLIC to maintain Great Life's capital at the minimum levels required by federal regulations for insured savings associations.

Respondent entered into the agreement for a term of five years. *Id.* at 2a-3a.

During that five-year period, Great Life's capital fell below the prescribed minimum level. App., *inf a*, 3a. In November, 1989, the FHLBB's successor, the Office of Thrift Supervision (OTS), notified respondent of the capital deficiency and asked him to satisfy his obligation under the agreement. Respondent refused. After repeatedly and unsuccessfully asking respondent to infuse funds into Great Life, the OTS placed the institution into receivership in the early summer of 1990. *Ibid.*

In July, 1990, the OTS initiated an administrative proceeding against respondent. App., *infra*, 3a. In April, 1993, an administrative law judge issued a recommended decision in which he determined that respondent was liable for violating his agreement to maintain Great Life's net worth. The Acting Director of OTS affirmed the administrative law judge's conclusion, with certain modifications, and he ordered respondent to pay more than $1.5 million into the Great Life receivership estate. *Id.* at 3a-4a.

The Acting Director concluded that respondent had failed to honor a written agreement to maintain Great Life's capital at required levels, and that respondent's failure to do so unjustly enriched him within the meaning of 12 U.S.C. § 1818(b)(6)(A)(i). App., *infra*, 53a-55a, 65a-67a. Specifically, the Acting Director found that:

> Respondent voluntarily entered into the Agreement to obtain a benefit from the federal government. * * * Respondent did so as a majority shareholder so that the Association could commence operations enjoying the benefits of

> federal insurance. * * * Respondent has been unjustly enriched by his failure to comply with the Agreement, by retaining funds or property that belong to the Association [*i.e.*, the capital that he refused to infuse pursuant to the Agreement], while the Association received the benefits of deposit insurance.

App., *infra*, 66a.

The court of appeals granted respondent's petition for judicial review and set aside the OTS's decision. App., *infra*, 1a-25a. The court rejected the Acting Director's interpretation of the scope of his authority to order compliance with a net worth maintenance agreement under Section 1818(b). Instead, the court assumed that an order to comply with such an agreement by paying money would be an order to take "affirmative action" under Section 1818(b)(1). Relying on its prior decision in *Wachtel* v. *OTS*, 982 F.2d 581 (1993), the court held that

> for the OTS to order a party to undertake any "affirmative action to correct conditions resulting from violations or practices," it must show either that the party has been "unjustly enriched" or that his conduct "involved a reckless disregard for the law or any applicable regulations or prior order of [a] Federal banking agency."

App., *infra*, 9a.

The court then held that Congress's use of the term "unjustly enriched" in Section 1818(b)(6)(A)(i) was limited by the historical usage of the term "unjust enrichment" by common-law courts. Applying what it regarded as common law principles, the court concluded that, in order to obtain recovery on an

unjust enrichment theory, a banking agency must show that the party subject to the order received and retained a benefit that properly belonged to an institution or to the agency. *Id.* at 11a-12a. It further ruled that the amount that could be recovered would equal only the value of the benefit received and retained, not the loss suffered by the affected institution or agency. *Id.* at 12a-13a. Thus, with respect to a net worth maintenance agreement, the court would measure the recovery by the amount of benefit the obligor received and retained, rather than by the net worth deficiency he had agreed to cure. The court therefore rejected the Acting Director's conclusion that respondent had been "unjustly enriched" in an amount equal to the amount that he refused to infuse into Great Life in accordance with his agreement.

In rejecting the OTS's reading of the statutory language, the court held that the OTS's interpretation was not entitled to any deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because four banking agencies share responsibility for administering the same provision. App., *infra*, 10a-11a. Judge Rogers wrote separately to disassociate herself from that holding. *Id.* at 20a-25a. Judge Rogers concurred in the court's judgment, however, on the ground that "the legislative history indicates that Congress did not intend the phrase used in § 1818(b)(6)(A)(i) to encompass the retention of funds owed under a net worth maintenance agreement." *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

The decision below is erroneous, and it conflicts with decisions of other courts of appeals. Because any person whom a federal banking agency orders to comply with a written agreement may seek review of that order in the Court of Appeals for the District of Columbia Circuit, the government will have no practical opportunity to litigate the relevant issues further in other courts. Nor would postponing review materially aid this Court in its consideration and resolution of the questions presented. In addition, the court of appeals' decision stands as a serious obstacle to the efficient administrative enforcement of written agreements between federal banking authorities and the institutions and individuals that Congress has charged them with regulating.

1. The court of appeals has held, in effect, that Congress did not give the federal banking agencies to which 12 U.S.C. 1818 applies administrative authority to enforce written agreements entered into between those agencies and financial institution "insiders" as a condition for the grant of a federal regulatory benefit (here, the provision of federal deposit insurance). That decision is wrong, both because the court improperly refused to defer to petitioner's reasonable interpretation of the term "unjustly enriched" as it is used in Section 1818(b)(6)(A)(i), and because the proper statutory analysis supporting petitioner's authority to enter the order should not have required resort to that provision in the first place.

a. Section 1818(b)(1) confers on each of the four federal banking agencies the authority to issue cease-and-desist orders under various circumstances. As relevant here, an agency may issue such an order,

after an administrative hearing, to any "institution-affiliated party" that it finds has violated "any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency." 12 U.S.C. 1818(b)(1). The order may require the affiliated party "to cease and desist from any such violation." *Ibid.* It may, in addition, order the party "to take affirmative action to correct the conditions resulting from any such violation." *Ibid.* Section 1818(b)(6) goes on to specify that the authority to require "affirmative action"

> includes the authority to require * * * such party to—
>
> > (A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—
> >
> > > (i) such * * * party was unjustly enriched in connection with such violation * * *; or
> > >
> > > (ii) the violation * * * involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;
> >
> > * * * * *
>
> and
>
> > (F) take such other action as the banking agency determines to be appropriate.

The Federal Deposit Insurance Act, of which Section 1818 is a part, does not further define the term "unjustly enriched" as it is used in Section 1818(b)(6). The Acting Director of the Office of Thrift

Supervision concluded that the facts of this case, in which respondent (i) signed a written agreement to maintain the capital of his institution, as an express condition for the approval of the institution's initial application for federal deposit insurance, and (ii) failed to honor that agreement according to its terms, thereby (iii) obtaining the benefit of deposit insurance for his institution and retaining funds that he had agreed to invest, when needed, to support the institution, fell within the scope of this statutory language. App., *infra*, 65a-67a. That conclusion is reasonable, and it was entitled to deference from the court of appeals.

The doctrine of unjust enrichment contemplates situations where a person "has and retains money or benefits which in justice and equity belong to another." *Black's Law Dictionary 1535* (6th ed. 1990); see also, *e.g.*, Restatement of Restitution § 1 (1937). Against that background, it is not difficult to conclude that the statutory term "unjustly enriched" could apply to an individual like respondent, who has retained funds that he had explicitly agreed to use to support his institution, leaving the federal deposit insurance system (and, ultimately, the taxpayers) with a liability that was originally undertaken only in reliance on that agreement. That interpretation is, moreover consonant with the history and purposes of Section 1818(b).

Section 1818(b)(6) is a small part of a comprehensive and specialized legal and administrative framework designed to give federal regulators the authority they need to maintain the safety and soundness of many of the nation's financial institutions and the federal deposit insurance system.

When Congress first amended Section 1818(b) to permit the issuance of cease-and-desist orders to institution-affiliated parties, the House committee report made clear that Congress expected federal regulators to use their powers "vigorously * * * to make the nation's financial institutions function properly." H.R. Rep. No. 1383, 95th Cong., 2d Sess. 17 (1978).[1] The Senate report noted that the new authority might be used, "[f]or example, * * * where a dominant and controlling individual is responsible for unsafe or unsound practices and relief cannot reasonably be obtained by bringing an action against the institution[, or] * * * where an insider has unjustly enriched himself at the expense of the institution." S. Rep. No. 323, 95th Cong., 1st Sess. 7 (1977).

Thus, Congress clearly intended to provide the authority to proceed administratively against affiliated individuals who were harming or had harmed the institution, in circumstances in which an order entered against the institution itself would not provide an effective remedy. That principle applies to this case.

In 1986, the Seventh Circuit held that Section 1818 (b), as then in effect, did not permit the Comptroller of the Currency to proceed administratively to order

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[1] The FHLBB, in particular, had sought authority to issue cease-and-desist orders to institution-affiliated parties to obtain restitution for institutions in cases where a "wrongdoing officer or director * * * may be acting against the best interests of the institution." *Hearings on H.R. 9086 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. Pt. 4, at 2305 (1977); see also *id.* at 2303-2308.

individual bank directors to reimburse a bank for losses caused by their repeated approval of loans in excess of statutory limitations. *Larimore* v. *Comptroller of the Currency*, 789 F.2d 1244 (1986) (en banc). The court held that, with the possible exception of situations in which a bank insider had been "unjustly enriched," regulators could attempt to impose personal monetary liability only through judicial proceedings. *Id.* at 1256.

Three years later, at the height of the savings and loan crisis (and as respondent's institution was becoming insolvent), Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). In that Act, Congress sought "[t]o strengthen the enforcement powers of Federal regulators," and in particular to clarify and expand the banking agencies' authority to impose affirmative relief obligations on institutional insiders. 12 U.S.C. 1811 note; see also H.R. Conf. Rep. No. 222, 101st Cong., 1st Sess. 393 (1989); H.R. Rep. No. 54, 101st Cong., 1st Sess. Pt. 1, at 307-308, 310-311, 464 (1989).

FIRREA added Section 1818(b)(6), in order to "overrule[]" *Larimore* and to clarify the banking agencies' "authority to issue an order requiring persons and institutions to take affirmative action to correct certain conditions." See H.R. Rep. No. 54, Pt. I, at 392, 468; S. Rep. No. 19, 101st Cong., 1st Sess. 39-40 (1989). The new statutory language evidences an intention to grant regulators broad discretion in fashioning appropriate relief. See 12 U.S.C. 1818(b)(6) (allowing orders to "make restitution or provide reimbursement, indemnification, or guarantee against loss," to take various other specific actions,

and to "take such other action as the banking agency determines to be appropriate"). The OTS relied in part on that broad language in issuing the order at issue in this case. See, *e.g.*, App., *infra*, 53a, 55a.

The court of appeals set aside that order on the ground that respondent had not been "unjustly enriched," within the meaning of Section 1818(b)(6)(A)(i), by his failure to comply with his capital maintenance agreement. App., *infra*, 9a-14a. The court held that "['u]njust enrichment'] is a term of art at common law and we must presume that the Congress used it as such, *mutatis mutandis*, when it imported the term into the field of bank regulation." *Id.* at 11a. It went on to hold that, at common law, unjust enrichment is measured by the defendant's gain, rather than by the plaintiff's loss, and it concluded that the amount that the OTS ordered respondent to pay was linked, not to any benefit he had received, but to losses suffered by the agency. *Id.* at 13a. Second, citing principles relating to the weighing of equities, the court observed that any benefit respondent had received had, "for reasons not attributable to [respondent] himself," become valueless by the time that the OTS had asked him to comply with his agreement. *Ibid.*

We believe that the court placed undue reliance on its view of the technical common-law meaning of "unjust enrichment." While the traditional legal usage of that term is relevant to the interpretation of the similar phrase "unjustly enriched" that is used in Section 1818(b)(6), see, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952), the court took insufficient notice of its own acknowledgement (App., *infra*, 11a) that statutory terms must be interpreted "*mutatis mutandis*." See *Moskal* v. *United States*,

498 U.S. 103, 117 (1990); *Taylor* v. *United States*, 495 U.S. 575, 593 (1990).

In this case, Congress used the term "unjustly enriched" in the context of an enforcement provision clearly meant to afford federal regulators broad authority to respond promptly to situations in which bank insiders take improper actions that shift benefits to themselves and risks or losses to their institutions, or to the federal fisc. Section 1818(b)(6)(A) thus authorizes orders to "make restitution or provide reimbursement, indemnification, or guarantee against loss." While "restitution," and perhaps "reimbursement," are terms commonly associated with common-law "unjust enrichment," the same is not true of "guarantee against loss." Thus, Congress seemingly provided for remedies significantly broader than those available for "unjust enrichment" at common law.[2] Similarly, it seems most likely that Con-

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[2] The OTS's decision in this case comports with the thrust of traditional equitable principles. Respondent obtained deposit insurance for his institution, and hence received the performance that he had sought from the government when he agreed to maintain the institution's capital. When the time came for *his* performance, however, he reneged on his part of the bargain. Traditionally, a party that breaches an agreement after receiving performance has been "unjustly enriched." See, *e.g.*, Restatement (Second) of Contracts § 344, cmt. a (1981); Restatement of Restitution §§ 107-108 (1937). Furthermore, if restitution is otherwise appropriate, the fact that a benefit once received is lost through the failure of a third party (here, the institution) does not lessen the duty to make restitution. See Restatement (Second) of Contracts § 370, cmt. a, illus. 3 (1981). Moreover, while the breaching party's gain may not always equate to the loss suffered by the injured party, the breaching party may be deemed to have received a gain equivalent to the amount he saved as

gress intended the term "unjustly enriched" to be given a meaning sensibly adapted to regulatory setting in which it was used.[3]

b. In any event, the outcome of this case should not have turned on the interpretation of the term "unjustly enriched" in Section 1818(b)(6). Section 1818(b)(1) provides federal banking agencies with the general authority to issue orders requiring that institution-affiliated parties "cease-and-desist from any * * * violation" of, among other things, "any condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution," or "any written agreement entered into with the agency." In this case, respondent entered into a written agreement, as a condition for his institution receiving deposit insurance, and then violated that agreement. The OTS ordered him to cease and desist from that violation. App., *infra*, 84a.

The agreement in question in this case was one to pay money under defined circumstances, which in

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a result of not satisfying his obligation. See *Ocor Products Corp.* v. *Walt Disney Productions*, 682 F. Supp. 90, 95 (D.N.H. 1988); Hunter, *Modern Law of Contracts* ¶ 9.02[3] (1993).

[3] The court of appeals gave considerable weight to *Larimore*'s discussion of the relationship between Section 1818(b) and 12 U.S.C. 93, see App., *infra*, 14a-19a, even suggesting (*id.* at 18a-19a) that the "remedy of choice" in this case would be a suit in district court under Section 93. The court's emphasis is puzzling, first, because *Larimore* did not involve a written agreement, and second, because neither Section 93 (which applies exclusively to certain actions brought by the Comptroller of the Currency) nor any other provision creates a specific cause of action for banking agencies to seek redress for violations of regulatory agreements.

fact came to pass. The cease-and-desist order requiring specific performance of that agreement was therefore an order to pay money. The validity of that order does not depend on the agency's authority, under the last sentence of subsection (b)(1), to order a party "further, to take affirmative action to correct the conditions resulting from any * * * violation." Nor does it depend on the interpretation of subsection (b)(6), which relates exclusively to orders for such "further * * * affirmative action." Those provisions merely *supplement* the agency's basic authority to order an institution or its insiders to cease and desist from violating a written agreement they have entered into with the agency; and it is that basic authority that most directly supports the order issued to respondent in this case. Cf. *Bowen* v. *Massachusetts*, 487 U.S. 879, 893-901 (1988) (distinguishing specific relief requiring payment of money from "money damages").[4]

The OTS's decision in this case considered separately whether respondent had violated his agreement and could be ordered to cease and desist from that violation (App., *infra*, 53a-55a), and whether he had been "unjustly enriched" by the violation (*id.* at 65a-67a). The order entered against respondent was similarly stated both in terms of an order to cease and desist, and in terms of an order to pay a specific

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[4] Alternatively, it would also be possible to conclude that ordering a payment is an order for "affirmative action," but that the provisions of Section 1818(b)(6) are exemplary, and were not intended to impose inflexible limits on the permissible terms of any order otherwise proper under subsection (b)(1). See especially 12 U.S.C. 1818(b)(6)(F); but see *Wachtel* v. *OTS*, 982 F.2d 581, 585 (D.C. Cir. 1993).

amount. *Id.* at 84a. The D.C. Circuit, however, had explicitly rejected, in the earlier case of *Wachtel* v. *OTS*, 982 F.2d 581, 586 (1993), any argument that an order to comply with monetary obligations under a net worth maintenance agreement could be entered under the authority of subsection (b)(1), without any need to rely on the specific provisions of subsection (b)(6). See note 4, *supra*. The OTS has never conceded the correctness of *Wachtel*'s holding on that point. There would, however, have been little point in raising the issue below in light of *Wachtel*, cf. Gov't C.A. Br. 35-37 (distinguishing *Wachtel*). Indeed, the court explicitly reaffirmed *Wachtel*'s holding in its opinion in this case. App., *infra*, 9a. In these circumstances, the question of the proper interpretation of subsection (b)(1)'s basic "cease-and-desist" authority is properly presented in this case. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).[8]

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[8] This Court has traditionally refused to affirm an agency order on the ground that the agency could have entered it on the basis of different policy grounds from those articulated by the agency, or on any discretionary ground if the agency's stated rationale was that its action was legally compelled. See, *e.g.*, *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87, 92-95 (1943). That policy, which is intended to safeguard the exercise of administrative discretion, is not involved in this case. The Court could properly affirm the OTS's order on the ground that it was never required to prove unjust enrichment, because that result would merely require the agency to prove less than it was prepared to prove (on its view of the law) in order to support an order that it clearly wished (and still wishes) to issue. Alternatively, the Court might choose to clarify the

c. The court of appeals should, in any event, have deferred to the OTS's permissible interpretation of the term "unjustly enriched" in § 1818(b)(6)(A)(i), a provision that is intimately related to the agency's discharge of duties imposed on it by Congress. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 854 (1984). Instead, the court held that it "owe[d] no such deference to the OTS's interpretation of § 1818 because the agency shares responsibility for the administration of the statute with at least three other agencies." App., *infra*, 10a. In the court's view, according deference to any one of those agencies in a particular case would "lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Ibid.*

As Judge Rogers pointed out in her concurrence (App., *infra*, 20a-25a), that analysis is "too facile." *Id.* at 23a. To begin with, in this case there is no evidence that the relevant agencies have adopted diverging interpretations of the provision in question. Section 1818(b) is an enforcement statute shared by four closely related agencies, which work closely together in administering federal banking laws.[6] In-

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legal requirements of Section 1818(b) as a whole, and then remand to the agency for whatever further proceedings might be deemed appropriate.

[6] The Comptroller of the Currency and the Director of the OTS sit on the board of the FDIC, in which capacity they make agency decisions in proceedings under Section 1818. The banking agencies also coordinate many of their activities. In 1978, for instance, Congress created the Financial Institu-

deed, three of the agencies have concluded in common that monetary relief under Section 1818(b) may properly be measured by the loss suffered by an affected institution. See *Cavallari* v. *Office of the Comptroller of the Currency*, 57 F.3d 137, 144 (2d Cir. 1995); *Simpson* v. *OTS*, 29 F.3d 1418, 1425-1426 (9th Cir. 1994); *In re Palmer*, FDIC Enforcement Decisions & Orders, Adjudicated Decisions, Vol. 1, A-1808.10 (1991).[7]

The court's decision not to defer to the OTS's interpretation of Section 1818 apparently depends on the fact that Congress chose to consolidate the enforcement provisions applicable to the four banking agencies, rather than to adopt separate but identical statutes for use by each. That result makes little sense. Furthermore, by refusing to give deference to any one of those agencies, on the theory that there might be conflicting views, the court has effectively deprived itself—as well as Congress and the public—of the benefit of *all* banking agency expertise, and

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tions Examinations Council, which "provides a mechanism which can be used to provide coordination and cooperation among the agencies." H.R. Rep. No. 1383, *supra*, at 24; see also, *e.g.*, 12 U.S.C. 3305(b); 12 U.S.C. 1828(*o*) (banking agencies to adopt certain uniform regulations); 12 U.S.C. 1828(p) (agencies to consult concerning capital standards); 12 U.S.C. 4803(a)(2) (agencies to work jointly to achieve uniform regulations and guidelines implementing common statutory or supervisory policies); 60 Fed. Reg. 35,674 (1995); 60 Fed. Reg. 32,882 (1995); 59 Fed. Reg. 64,561 (1994); 59 Fed. Reg. 29,482 (1994).

[7] We are, in addition, informed by counsel for the Federal Reserve Board that the Board views the facts in this case as meeting the requirements of Section 1818(b)(6)(A)(i).

assumed a *de novo* review function that this Court has made clear is inappropriate in the face of even merely "permissible" agency statutory interpretations. *Chevron*, 467 U.S. at 854. The court's decision on this point also warrants review and correction by this Court.

2. The decision of the court of appeals in this case conflicts with the decisions of other courts of appeals. In *Akin* v. *OTS*, 950 F.2d 1180, 1184 (1992), the Fifth Circuit concluded that "[r]ead in its entirety, [FIRREA] manifests a purpose of granting broad authority to financial institution regulators. The statute suggests that unjust enrichment has a broader connotation than in traditional contract law." On that basis, *Akin* required a bank insider to satisfy his obligations under a net worth maintenance agreement. The court affirmed an order in which the OTS required payment of the amount the insider had failed to pay under his agreement. Unlike the decision below, therefore, *Akin* construed Section 1818 (b)(6) in a manner that fulfills Congress' intention that the statute be read broadly to achieve the purpose of enhancing safety and soundness and protecting the federal insurance funds.

Similarly, in *Simpson* v. *OTS*, *supra*, which involved an award of restitution for reckless disregard of the law under Section 1818(b)(6)(A)(ii), the Ninth Circuit affirmed an order that measured recovery by the loss caused to an institution by an insider's misconduct, not by measurable benefits conferred on or retained by the insider. See also *Cavallari* v. *Office of the Comptroller of the Currency*, 57 F.3d at 144-145 (construing Section 1818(b)(6)(A),

and remanding for computation of the loss suffered by the institution at issue). While neither *Simpson* nor *Cavallari* involved a net worth maintenance agreement, and neither interpreted the term "unjustly enriched," both decisions support a different and considerably more sensible construction of the banking agencies' authority to order remedial payments under subsection (b)(6)(A) than the court below was willing to adopt.[8]

Finally, the court of appeals' decision refusing to accord *Chevron* deference conflicts with *Seidman* v. *OTS*, 37 F.3d 911, 924 (3d Cir. 1994), *Simpson*, 29 F.3d at 1425, and *Akin*, 950 F.2d at 1185. All of those cases, while not specifically discussing the issue of multiple administration of a single statute, deferred to OTS's interpretation of section 1818(b). Similarly, *Rapp* v. *OTS*, 52 F.3d 1510, 1518 (10th Cir. 1995), and *Oberstar* v. *FDIC*, 987 F.2d 494, 501 (8th Cir. 1993), recognized that deference was due to the banking agencies' interpretations of another section of the FDIA that is also subject to administration by more than one banking agency.[9]

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[8] If, as *Simpson* and *Cavallari* implicitly hold, Congress did not adopt the common law concept of "restitution" as a strict limit on the monetary relief available under subsection (b)(6)(A), then it would be inconsistent to impose such a definitional straitjacket on the related statutory phrase "unjustly enriched." Although the court of appeals did not discuss these cases, it attempted to distinguish *Akin* by expressing "no view on the Fifth Circuit's implicit conclusion that once a party has been unjustly enriched, he may be held liable for the institution's loss, i.e., for an amount in excess of his own enrichment." App., *infra*, 17a.

[9] But cf. *1185 Ave. of Ams. Ass'n* v. *RTC*, 22 F.3d 494, 497 (2d Cir. 1994) (less than full deference due to agency

These conflicting decisions show the existence of a serious issue concerning the correctness of the decision below. Under Section 1818(h)(2), however, any party to whom an order is issued under Section 1818(b) may seek review in the D.C. Circuit. Absent review, therefore, the decision below is final in import and nationwide in effect. That observation both underscores the importance of review to the banking agencies, and indicates that there is no reason to delay review in order to await further development of the issues in the lower courts.

3. The decision below in this case imposes substantial and unjustified limits on the ability of federal banking agencies to order the payment of monetary relief in administrative proceedings. Specifically, it precludes a federal banking agency from issuing a cease-and-desist order requiring an institution-affiliated party that has violated a regulatory condition or written agreement to make a cash payment—even if that payment is the precise performance that was bargained for under the agreement—unless the agency can show, not only the violation, but that the wrongdoing insider either was "unjustly enriched" in a strict common-law sense, or acted with "reckless disregard" for the law, a regulation, or a prior agency order. Further, even where such an order is based on a finding of unjust enrichment, relief ordered would evidently be limited by the decision below to the value of some readily quantifiable benefit that the insider could be shown to have received and retained, without any regard either to the insider's breached commitments or to losses sustained by the institution

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interpretation of a different provision of the FDIA where more than one agency administers statute).

or the federal deposit insurance funds. Those results are neither sensible nor just.

With specific regard to net worth maintenance agreements of the sort that respondent signed and breached, the OTS estimates that there are more than 150 such agreements outstanding, of which more than 50 involve institutions that are in receivership.[10] The decision below therefore directly affects a substantial number of existing agreements, many of which are in default.

In addition, the decision raises serious questions about the banking agencies' ability to effectuate the policy mandated by the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA), of requiring a holding company to assist the recapitalization of its financial institution subsidiary if that institution suffers a deficiency in its capital. See 12 U.S.C. 1831*o*(e)(2)(C)(ii), 1831*o*(e)(2)(E). Under FDICIA, when an insured depository institution becomes undercapitalized, it must submit a plan for restoring its capital, and its holding company must "guarantee[] that the institution will comply with the plan." 12 U.S.C. 1831*o*(e)(2)(C)(ii)(I). If the holding company fails to provide the required guarantee, the appropriate banking agency is authorized to take a number of supervisory actions to reduce the risks faced by the federal insurance funds. See 12 U.S.C. 1831*o*(f). The statute makes no specific provision for the enforcement of the holding company

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[10] We are informed that there are approximately 1,450 institutions subject to the OTS's jurisdiction. The OTS informs us that it is not presently seeking to obtain new net worth maintenance agreements. See App., *infra*, 63a. A requirement for such agreements might be imposed again, however, should industry conditions or other circumstances change.

guarantee, leaving it to be enforced in the same manner as any other written agreement. The decision below renders the prospects for such enforcement extremely problematic.

The effect of the decision below also extends beyond its impact on net worth maintenance agreements. Under the court of appeals' reasoning, a banking agency could not issue an administrative order requiring reimbursement or a guarantee against possible future losses in any case where an insider's breach of a written agreement with the agency concerning an unsafe or unsound practice not specifically prohibited by statute, regulation or prior order causes damage to the institution or presents the possibility of future losses, so long as the insider received no readily quantifiable benefit from the agency or the institution. The decision therefore not only severely undercuts the OTS's ability to obtain compliance with net worth maintenance agreements, it also has serious adverse implications for the ability of all federal bank regulatory agencies effectively to discharge their statutory responsibilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 93-1811

ROBERT D. RAPAPORT, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION, RESPONDENT

Argued Jan. 31, 1995

Decided July 11, 1995

Before GINSBURG, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

Opinion concurring in part and concurring in the judgment filed by Circuit Judge ROGERS.

GINSBURG, Circuit Judge:

Robert D. Rapaport was the majority shareholder of a savings and loan association that failed. There-

after the Office of Thrift Supervision, as successor to the Federal Savings and Loan Insurance Corporation, ordered him to pay approximately $1.5 million pursuant to his agreement personally to maintain the capital in the institution at no less than the minimum required by regulation. We hold that because the OTS has not shown that Rapaport was "unjustly enriched," it may not enforce the agreement against him in an administrative (as opposed to judicial) proceeding. Accordingly, we grant Rapaport's petition for review and set aside the agency's order.

I. Background

Great Life Savings Association of Sunrise, Florida, a state-chartered institution, applied to the FSLIC for deposit insurance in April 1984. While Great Life's application was pending, the Federal Home Loan Bank Board—the governing body of the FSLIC—promulgated a regulation requiring that any individual who owned 25% or more of the stock of a newly insured savings association "personally guarantee the maintenance of the association's net worth at the regulatorily required level." *See* 49 Fed.Reg. 41237, 41244 (Oct. 22, 1984), codified at 12 C.F.R. § 571.6 (c)(4)(i) (1985). Accordingly, when the FHLBB approved Great Life's application, it did so upon the condition that Rapaport, who planned to purchase 74% of the Great Life's shares, enter into a Net Worth Maintenance Agreement with the FSLIC.

Rapaport ultimately purchased 69.9% of Great Life's stock. In March 1985 he entered into a five-year Agreement that provided:

> [I]n consideration of the FSLIC granting insurance of accounts to the Association, the Ac-

> quiror agrees . . . pursuant to the requirements of 12 C.F.R. § 571.6(4), or any successor regulation thereto, to maintain the Association's net worth in compliance with the Net Worth Requirement applicable to the Association, computed in accordance with 12 C.F.R. § 563.13, or any successor regulation then in effect.

The FHLBB approved Great Life's insurance application and the thrift opened for business in May 1985.

Owing primarily to the number of nonperforming commercial real estate loans on its books, Great Life, like many thrift institutions in the late 1980s, began to experience capital deficiencies. In November 1989 the OTS notified Rapaport that Great Life's capital was deficient by $152,000 and asked him to contribute $106,248 (69.9% of the total) pursuant to the Agreement. Rapaport responded that he was expending "great effort"—but not by actually contributing any capital—to improve Great Life's financial health. After further investigation, the OTS determined that Great Life's capital deficiency amounted to some $3.5 million as of December 31, 1989. In June 1990 the Resolution Trust Corporation was appointed receiver of Great Life, which has since been liquidated.

The OTS began an administrative proceeding against Rapaport in July 1990. In April 1993 an Administrative Law Judge found that: (1) Rapaport's role in the activities of Great Life "was limited solely to that of a stockholder"; (2) Rapaport was "unjustly enriched within the meaning of [12 U.S.C. § 1818(b)(6)(A)(i)]" because he received the benefit of Great Life's having deposit insurance while retaining the capital he was supposed to contribute

under the Agreement; and (3) under the Agreement Rapaport was obliged to contribute $1,946,000 to help cover Great Life's capital deficiency.

The Acting Director of the OTS affirmed the ALJ's decision, though he corrected it insofar as the ALJ had suggested that the benefit of insurance received by Great Life, rather than Rapaport's retention of what the Agreement allegedly required him to pay, was the basis for holding that Rapaport had been "unjustly enriched." (He also reduced Rapaport's liability to $1,536,675 based upon a revised valuation of one of Great Life's loans.) Like the ALJ, the Acting Director based his decision that Rapaport was liable for his unjust enrichment upon Rapaport's personal responsibility, as a stockholder, for Great Life's capital shortfall; he did not rely upon any role that Rapaport might have played in the management of Great Life.

Before this court Rapaport faults the Acting Director's decision in four respects. First, he claims that the OTS does not have statutory authority to bring this action against him. Instead, he submits that the Federal Deposit Insurance Corporation—as the manager of the FSLIC Resolution Fund—is the only agency (if any) that can pursue a claim based upon the Agreement. Second, Rapaport claims that the OTS failed to show that he was "unjustly enriched," as required by this court's decision in *Wachtel v. OTS*, 982 F.2d 581 (D.C.Cir.1993). If the court rejects his first two arguments, then Rapaport claims, third, that the Agreement expired in November 1989 when the regulation requiring such agreements was amended to exclude state-chartered

institutions, and he is not responsible for any capital deficiency occurring thereafter. Finally, Rapaport claims that the OTS miscalculated Great Life's capital deficiency because it improperly valued certain loans.

II. Analysis

Though we conclude that the OTS does have the authority administratively to enforce an agreement to which the FSLIC was a party, we also hold that the OTS failed in this case to make the required showing that Rapaport was "unjustly enriched." We therefore set aside the agency's decision without addressing Rapaport's last two arguments.

A. OTS's Authority to Enforce the Agreement

Rapaport argues that if any federal agency has the authority to enforce the Agreement, it is the FDIC rather than the OTS. Section 1818(b)(1) of 12 U.S.C. authorizes "the appropriate Federal banking agency" to enforce any condition imposed "by the agency" or any agreement entered into "with the agency." * The OTS cannot bring this action, accord-

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* 12 U.S.C. § 1818(b)(1) provides:

> If, in the opinion of the appropriate Federal banking agency, any insured depository institution, depository institution which has insured deposits, or any institution-affiliated party is engaging or has engaged, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to engage, in an unsafe or unsound practice in conducting the business of such depository institution, or is violating or has violated, or the agency has reasonable cause to believe that the depository institution or any institution-affiliated party is about to violate, a law, rule, or regulation, or any

ing to Rapaport, because it was not "the agency" that entered into the Agreement, which was with the FSLIC (as opposed to the FHLBB, the governing body of the FSLIC). Further, because "all assets and liabilities of the [FSLIC]" were transferred to the FSLIC Resolution Fund, *see* 12 U.S.C. § 1821a (a)(2)(A), and the FSLIC Resolution Fund is managed by the FDIC, he claims that only the FDIC may proceed against him for any deficiency. *See also CityFed Financial Corp. v. OTS*, 58 F.3d 738 (D.C. Cir.1995) (holding OTS has jurisdiction to enforce cease and desist order against holding company affiliated with failed savings and loan).

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condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution or any written agreement entered into with the agency, the agency may issue and serve upon the depository institution or such party a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the depository institution or the institution-affiliated party. . . . [I]f upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the depository institution or the institution-affiliated party an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the depository institution or its institution-affiliated parties to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

Not so. Rapaport entered into the Agreement with the FSLIC, and when the Congress abolished the FSLIC and the FHLBB, *see* Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub.L. No. 101-73, § 401(a), 103 Stat. 183 (August 9, 1989) (FIRREA); *see also* Historical Note at 12 U.S.C.A. § 1437 (West Supp.1994), it also passed savings provisions stating that their abolition would "not affect the validity of any right, duty, or obligation" of those agencies. FIRREA § 401(f)-(g). Indeed, the Congress specifically provided that all "orders, resolutions, determinations, and regulations" of the FSLIC and of the FHLBB—which would include the regulations requiring and supporting the Agreement—"shall be enforceable by or against the Director of the [OTS], the [FDIC], the Federal Housing Finance Board, or the [RTC], as the case may be." FIRREA § 401(h). Hence, one of those four agencies must be able to enforce the Agreement.

Under 12 U.S.C. § 1818(b), it is "the appropriate Federal banking agency"—a defined term—that may institute proceedings requiring a party "to [ ] make restitution or provide reimbursement, indemnification, or guarantee against loss if [that] party was unjustly enriched in connection with [a] violation [of 'any law, rule, or regulation, or any condition imposed in writing by the agency in connection with the granting of any application or other request'] or [an unsafe or unsound banking] practice." 12 U.S.C. § 1818(b)(1), (6). "Appropriate Federal banking agency" is defined, "in the case of any savings and loan association," as "the Director of the [OTS]." 12 U.S.C. § 1813(q)(4) (also noting there may be more than one appropriate agency per case). The

OTS is therefore the appropriate agency to enforce the Agreement between Rapaport and the FSLIC.

Moreover, the FIRREA provisions dealing with the powers and duties of the OTS provide specifically that: "[t]he Director [of the OTS] shall have all powers which [ ] were vested in the [FHLBB] (in the Board's capacity as such) . . . and were not [ ] transferred to the [FDIC or another agency]." 12 U.S.C. § 1462a(e). Thus the FIRREA not only gives the OTS general authority to enforce an agreement with a savings and loan, it also provides that the OTS succeeds to certain powers originally vested in the FHLBB and not transferred elsewhere.

Nonetheless Rapaport points out that the assets of the FSLIC were transferred to the FSLIC Resolution Fund, *see* 12 U.S.C. § 1821a(a)(2)(A), and that the FSLIC Resolution Fund is managed by the FDIC. From these facts he argues that the OTS is not authorized to enforce the Agreement, and is not in privity of contract with him. We disagree.

First, regardless of the enforcement authority of the FSLIC, the Agreement would certainly have been enforceable by the FHLBB, and as noted above, the OTS is the presumptive heir (via § 1462a(e)) to the powers of the FHLBB. Rapaport argues that the phrase "in the Board's capacity as such" in § 1462a(e) somehow precludes the OTS from exercising those powers held by the FHLBB in its capacity as director of the FSLIC, but we find no such negative implication in this affirmative grant of authority. Indeed, we take § 1462a(e) to mean just the opposite: powers vested in the FHLBB as the governing body of the FSLIC, including the power to enforce an agreement such as Rapaport's, may now be exercised by the OTS.

Second, we reject Rapaport's claim that the OTS is barred from enforcing the Agreement against him because it is not in privity of contract with him. This is not a suit for breach of contract and we express no view upon what would be required if it were; the OTS is here pursuing an administrative remedy and need only have some affirmative grant of authority to do so. That, as we have seen, it has.

B. Unjust enrichment

In order for the OTS to order a party to undertake any "affirmative action to correct conditions resulting from violations or practices," it must show either that the party has been "unjustly enriched" or that his conduct "involved a reckless disregard for the law or any applicable regulations or prior order of [a] Federal banking agency." 12 U.S.C. § 1818 (b)(6)(A);** *see Wachtel v. OTS*, 982 F.2d 581, 586 (D.C.Cir.1993). The OTS's only theory through-

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** 12 U.S.C. § 1818(b)(6) provides:

> The authority to issue an order under this subsection . . . which requires an insured depository institution or any institution-affiliated party to take affirmative action to correct or remedy any conditions resulting from any violation or practice with respect to which such order is issued includes the authority to require such depository institution or such party to—
>
> (A) make restitution or provide reimbursement, indemnification, or guarantee against loss if—
>
> (i) such depository institution or such party was unjustly enriched in connection with such violation or practice; or
>
> (ii) the violation or practice involved a reckless disregard for the law or any applicable regulations or prior order of the appropriate Federal banking agency;

out this case has been that Rapaport was "unjustly enriched," and therefore it must show as much before it can require him to pay a pro rata share of Great Life's capital deficiency.

The Acting Director's sole basis for concluding that Rapaport had, in fact, been unjustly enriched was simply that Rapaport "retain[ed] funds . . . belong-[ing] to [Great Life]"—i.e., the contested capital contribution—"while [Great Life] received the benefits of deposit insurance." Rapaport claims that this is insufficient to make out a case of unjust enrichment within the meaning of § 1818(b)(6)(A), and we agree.

As a preliminary matter, the OTS argues that we should defer to its construction of § 1818 under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We have already held in *Wachtel* that we owe no such deference to the OTS's interpretation of § 1818 because that agency shares responsibility for the administration of the statute with at least three other agencies. 982 F.2d at 585. The alternative would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all. Neither outcome is unthinkable, of course, but neither has the OTS suggested any reason to believe that the congressional delegation of administrative authority contemplates such peculiar corollaries. *Cf. Bowen v. American Hospital Association*, 476 U.S. 610, 642 n. 30, 106 S.Ct. 2101, 2120 n. 30, 90 L.Ed.2d 584 (1986) (refusing to defer to agency's construction of Rehabilitation Act because "not the same basis for defer-

ence predicated on expertise" as in *Chevron*); *see also CF Industries, Inc. v. FERC*, 925 F.2d 476, 478 & n. 1 (D.C.Cir.1991) (dictum implying deference may be due when all agencies concerned "agree as to the which of them has exclusive jurisdiction"). Hence, we proceed de novo.

"Unjust enrichment" is a term of art at common law and we must presume that the Congress used it as such, *mutatis mutandis*, when it imported the term into the field of bank regulation. Turning to a commentary upon the common law, we learn that the fundamental characteristic of unjust enrichment is "that the defendant has been unjustly enriched by receiving something . . . that properly belongs to the plaintiff[, thereby] forcing restoration to the plaintiff." Dobbs, LAW OF REMEDIES § 4.1(2). The law of Florida is typical: The elements of a cause of action based upon unjust enrichment are that: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant accepted and retained the benefit; and (3) it would be unjust for the defendant not to pay the plaintiff the value of the benefit. *See, e.g., Hillman Construction Corp. v. Wainer*, 636 So.2d 576, 577 (Fla.App.1994).

The agency's argument that Rapaport was "unjustly enriched" by his failure to pay the amount he allegedly owed under the Agreement is deeply flawed, for its fails to satisfy even the first element of a claim for unjust enrichment. If Rapaport "benefitted" from his failure to contribute capital to Great Life—and that is at best an odd way to describe what happened—it was not because the OTS or its predecessor conferred something upon him. Nor did Rapaport profit from Great Life's continued operation because of anything that the agency did to shore up the insti-

tution. Rapaport just failed to pay up as allegedly required by his contract. A breach of contract might give rise to liability for damages measured by the loss to the plaintiff, but unjust enrichment simply does not lie when the plaintiff has not bestowed some sort of benefit upon the defendant.

At best, the FSLIC conferred an indirect benefit upon Rapaport in that it allowed him to own more than 25% of the shares in a federally insured institution (the direct beneficiary of the Agreement being Great Life). In other words, Rapaport got the opportunity to invest more than otherwise would have been allowed. (Ultimately, of course, his investment was worth nothing, but Rapaport's opportunity to invest was presumably of some value ex ante.) Nothing in either the ALJ's or the Acting Director's decision indicates that Rapaport received any other benefit from the FSLIC or from Great Life (at which he held no office).

There are two problems with the opportunity-to-invest-more concept of "benefit," however. First, it was not advanced in the decision of the OTS. Second, we doubt whether it would be sufficient in any event to establish that Rapaport was unjustly enriched.

Though the decisions of the ALJ and the Acting Director are somewhat opaque on the nature of the benefit, we know that they did not consider Rapaport's opportunity to invest more the benefit that he received because the OTS has maintained throughout this proceeding that the amount of the benefit to Rapaport is the amount that he would have had to contribute to Great Life had he complied with the Agreement to the agency's satisfaction. That amount, however, bears no relation whatever to the value to Rapaport

of the FSLIC insuring Great Life's deposits, either at the outset or at the time of his alleged default. The $1.5 million Rapaport was allegedly required to contribute may arguably approximate the amount of the agency's loss attributable to Rapaport's alleged breach, but no principle in the law of restitution is more clear than this: "Restitution is measured by the defendant's unjust enrichment, not by the plaintiff's loss." Dobbs, RESTITUTION at § 4.5(1). The Acting Director actually paid lip service to this principle, but he ignored it in fact when he concluded that Rapaport was "unjustly enriched" by retaining the money he allegedly should have paid in under the Agreement. That is the equivalent of saying that the defendant must cover the plaintiff's loss, lest the defendant's failure to do so enrich him. The argument is circular, hardly more than a play upon words.

What makes this case even harder to square with any recognizable notion of unjust enrichment is that Rapaport's alleged obligation to contribute more funds did not even arise until the value of Rapaport's right to hold stock in excess of 25 percent had become, for reasons not attributable to Rapaport himself, little more than the right to lose that much more money. Whatever the value of the opportunity that Rapaport received from the OTS in 1985, he had neither realized any benefit from nor even retained it as of late 1989, when the OTS came calling for more funds; there was by then simply no benefit that he could be required to disgorge. *See* RESTATEMENT OF RESTITUTION § 142, Comment *a* (1937) ("When events are such that a loss must be suffered by one of the parties . . . justice does not require that the recipient should bear this loss where he is guilty of no greater fault than that of the claimant").

In short, the OTS has failed to demonstrate either that Rapaport was enriched or, if he was, why that enrichment was unjust. With only the Acting Director's *ipse dixit* to support the agency's claim, we see no reason to conclude that Rapaport was "unjustly enriched" by his failure to contribute capital to Great Life.

Even if we were to read the term "unjustly enriched" in § 1818(b)(6)(A) as having something other than its ordinary meaning at common law, our analysis in *Wachtel* of the history of the statute and of the related case law would lead us to the same conclusion. Prior to 1989, the law simply provided that the appropriate banking agency, after finding an unsafe or unsound practice or a violation of a law, rule, regulation, condition, or agreement could:

> require [a party] to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice.

12 U.S.C. § 1818(b)(1) (1988). The Seventh Circuit, however, held that this provision did not give regulators "the authority to impose personal damages . . . where there is no proof of personal enrichment." *Larimore v. Comptroller of the Currency*, 789 F.2d 1244, 1252 (7th Cir.1986) (en banc).

In *Larimore*, the directors of a bank had repeatedly approved loans in excess of the bank's statutory lending limit. *Id.* at 1246-47. The Comptroller argued that he could impose personal liability upon the directors in an administrative proceeding held pursuant to § 1818(b)(1). *Id.* at 1249. The court began its analysis by noting that under 12 U.S.C. § 93(a)

the Comptroller was authorized to collect damages from a bank director only if the director's liability was "determined and adjudged by a proper district or Territorial court of the United States in a suit brought by the Comptroller of the Currency." *Id.* at 1248-49. The court concluded that "[t]o allow the Comptroller to have the power to assess personal liability and damages against a director [under § 1818(b)(1)] without bringing his action in federal court would eviscerate the clear Congressional intent of 12 U.S.C. § 93(a) and 'would . . . sanction administrative preemption of the statutory enforcement scheme designed by Congress.'" *Id.* at 1252 (quoting *Citizens State Bank of Marshfield, Mo. v. FDIC*, 751 F.2d 209, 217 (8th Cir.1984)).

The court did allow for an exception, however, upon the basis of the legislative history of the statute, "where an insider has unjustly enriched himself at the expense of the institution." *Larimore*, 789 F.2d at 1252 (quoting S.Rep. No. 95-323, 95th Cong., 1st Sess. 7 (1977)). Thus, while the usual course of action would be for the regulatory agency to proceed under § 93, the agency could use the administrative procedures of § 1818(b)(1) "in those cases where adequate relief cannot otherwise be obtained," and in no others. *Larimore*, 789 F.2d at 1253.

When the Congress passed the FIRREA a few years later, it took pains to clarify, in the wake of *Larimore*, when a bank regulatory agency is able to hold a party personally liable in an administrative proceeding under § 1818. The amended § 1818 overruled *Larimore* insofar as it would have protected from administrative action an individual who had acted with reckless disregard for the law, but it also

codified the exception in *Larimore* allowing the agency to bring an administrative proceeding against an individual who had not recklessly disregarded the law but had unjustly enriched himself (presumably at the expense of the institution). *See* H.Rep. No. 54, 101st Cong., 1st Sess. 468 (1989); S.Rep. No. 19, 101st Cong., 1st Sess. 40 (1989), U.S.Code Cong. & Admin.News 1989, pp. 86, 264.

We set out much of this same exegesis in *Wachtel.* There the OTS had failed to find even to its own satisfaction that the individual it held liable had been unjustly enriched. *Id.* at 583. The agency was reduced to arguing that it could support its order notwithstanding the straightforward requirements of § 1818(b)(1). Indeed, the precise holding of *Wachtel* is the same as the holding of *Larimore:* A banking agency may not impose personal liability under § 1818(b)(1) in a case that does not involve unjust enrichment. *Id.* at 583. What the OTS could not do in either *Larimore* or *Wachtel* under § 1818(b)(1), it certainly cannot do here under § 1818(b)(6)(A), which expressly requires that the party being charged have been unjustly enriched. Section 1818(b)(6) cannot make it any easier for the OTS to impose personal liability than it is under § 1818(b)(1), or the former provision would 'eviscerate the clear Congressional intent" in the latter to require more, just as § 1818(b)(1) would have done to § 93(a) in *Larimore.*

Yet this is precisely what the OTS asks us to do. In *Larimore,* the directors of a bank had approved loans in violation of the law. This contributed to the bank's losses, but neither the court nor the Congress thought that the directors had been "unjustly enriched." *See* 789 F.2d at 1252 ("there is absolutely

no proof of personal enrichment"); H.R.Rep. No. 54 at 468, U.S.Code Cong. & Admin.News 1989, p. 264 ("*Larimore* . . . did not involve unjust enrichment"). Here Rapaport allegedly failed to abide by his Agreement to contribute capital; this might have contributed to (or at least accelerated Great Life's insolvency, but it certainly did not enrich Rapaport.

In essence, the OTS would have us approve the administrative assessment of personal liability in every case where a party agrees, but ultimately fails, to maintain the required level of capital, regardless whether he gains personally from the operation of the institution. The Congress clearly contemplated something more than failing to uphold one's end of a contract when it required that a party have been "unjustly enriched" before he can be held personally liable in an administrative proceeding.

Akin v. OTS, 950 F.2d 1180 (5th Cir.1992), is not necessarily to the contrary. Akin, like Rapaport, had agreed to maintain the required level of capital at a thrift institution that ultimately failed. *Id.* at 1182. Unlike Rapaport, however, Akin had been the sole shareholder, President, Chief Executive Officer, and Chairman of the Board of the failed institution. *Id.* at 1181. Had Rapaport received the benefits of office as Akin did, he may well have been "unjustly enriched," at least to that extent, and that distinction may be enough to reconcile the two cases. *See* 12 U.S.C. § 1818(b)(6)(A) (party may be ordered to "make restitution or provide reimbursement, indemnification, or guarantee against loss" if unjustly enriched). We express no view on the Fifth Circuit's implicit conclusion that once a party has been unjustly enriched, he may be held liable for the institution's loss, i.e., for an amount in excess of his own enrichment.

To the extent that Akin's enrichment does not serve to reconcile these two cases, we respectfully disagree with the Fifth Circuit. Responding to Akin's claim that he had not been unjustly enriched, that court acknowledged that the OTS's position did not "dovetail[] neatly into a pattern of transfer of a benefit and restitution of that benefit from a party wrongfully retaining it," but it refused to require "a precision fit" between the OTS's position and "black letter contract law." *Id.* at 1184. Rather, the court thought that the terms of the particular provision should be read broadly because the statute "[r]ead in its entirety . . . manifests a purpose of granting broad authority to financial institution regulators." *Id.* Sometimes that follows, sometimes not. *Cf. Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 320 (7th Cir.1994) (Easterbrook, J.: "A court must determine not only the direction in which a law points but also how far to go in that direction"). In this context, a "broad" reading of § 1818(b)(6)(A) is in effect an unlimited reading of a statute upon which the Congress intended to place a limit. Having read out of the law the limitation that the Congress had put into it, the *Akin* court was remitted to relying upon the mere hope that the OTS would limit itself; hence the precatory dictum that "restitution orders should [not] become a remedy of choice for OTS." 950 F.2d at 1184 n. 5. Yet it is hard to see why that would not inevitably be the result of the Fifth Circuit's decision.

We are mindful that Rapaport made an agreement with the FSLIC that (unless his third argument is well-founded) he appears to have breached. Federal bank regulators are not without means to force a

contract party to live up to his obligations, however. The Congress has simply made their "remedy of choice," to use the Fifth Circuit's phrase, a suit in district court under 12 U.S.C. § 93, where the safeguards and standards appurtenant to Article III courts apply. Only if Rapaport had been unjustly enriched—only if he had received and retained some personal benefit either from a federal regulator or from Great Life that he should in justice be required to disgorge—could the OTS force him onto the agency's own turf in order to exact restitution.

III. Conclusion

The OTS has the authority under the FIRREA to enforce a capital maintenance or other agreement in an administrative proceeding only against a party who has either been unjustly enriched or has acted with reckless disregard for some aspect of federal regulation. Rapaport's alleged failure to contribute as agreed in order to maintain Great Life's required level of capital does not amount to such unjust enrichment. Accordingly, we grant his petition for review and set aside the agency's final order.

So ordered.

ROGERS, Circuit Judge, concurring in part and concurring in the judgment:

In rejecting OTS's contention that the court should defer to its construction of 12 U.S.C. § 1818(b)(6)(A)(i) under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the majority concludes that "[w]e have already held in *Wachtel* [*v. OTS*, 982 F.2d 581, 585 (D.C.Cir.1993),] that we owe no such deference to the OTS's interpretation of § 1818 because that agency shares responsibility for administration of the statute with at least three other agencies." Majority Opinion at 216. However, *Wachtel*'s suggestion that deference is inappropriate when more than one agency administers a statute was dictum that relied on distinguishable caselaw. The court has yet to decide the appropriate standard to review the OTS's construction of this provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")[1] pertaining to cease and desist orders, and the court need not do so here. As in *Wachtel*, the result is the same whether the court applies *de novo* review or *Chevron* deference. The statutory language and the legislative history demonstrate that Congress did not intend that retention of money allegedly owed pursuant to a net worth maintenance agreement, by itself, would constitute "unjust enrichment" under § 1818(b)(6)(A)(i).

In Wachtel, a bank holding company sought review of OTS's order, pursuant to § 1818(b)(1), to make payments based on an alleged agreement to

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[1] Pub.L. No. 101-73, 103 Stat. 183 (codified in scattered sections of U.S.C.).

maintain the bank's net worth. 982 F.2d at 582-83. Although finding neither unjust enrichment nor reckless disregard of banking laws, OTS maintained that it could order the holding company to make the payments under § 1818(b)(1) without making these findings.[2] *Id.* at 585. The court rejected OTS's position as "almost frivolous," and proceeded to observe that even if *Chevron* deference were applicable, OTS's interpretation would fail because the statute was not ambiguous and OTS's interpretation was arbitrary. *Id.* While the court suggested that *Chevron* was inapplicable because OTS administered § 1818 jointly with other agencies, this was unnecessary to the court's holding that, under any standard of review, OTS's order was invalid. As dictum, the court's suggestion in *Wachtel* is not binding circuit law. *See, e.g., Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 897 (D.C.Cir.1992), *cert. denied*, —— U.S. ——, 114 S.Ct. 1642, 128 L.Ed.2d 363 (1994).

Although the court has stated that it does not defer to an agency's construction of a statute interpreted by more than one agency, *e.g., Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C.Cir.1993), the cases other than *Wachtel* itself appear readily distinguishable. For example, in *Clinton*, 997 F.2d at 913, which involved the Federal Advisory Committee Act, the court cited two cases involving statutes that apply to all agencies. *See FLRA v. United States Dep't of Treasury*, 884 F.2d

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[2] OTS also argued that § 1818(b)(6)(A) was inapplicable "because the money it would extract from petitioners is not really restitution, reimbursement, indemnification, or guarantee against loss." 982 F.2d at 585. Here, OTS seeks to recover from Rapaport under § 1818(b)(6)(A).

1446, 1451 (D.C.Cir.1989) (no deference to FLRA's interpretation of the Freedom of Information Act ("FOIA") and the Privacy Act because "the FLRA is not charged with a special duty to interpret" these statutes), *cert. denied*, 493 U.S. 1055, 110 S.Ct. 863, 107 L.Ed.2d 947 (1990); *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 734 (D.C.Cir.1987) (no deference to any agency interpretation of FOIA because "it applies to all government agencies, and thus no one executive branch entity is entrusted with its primary interpretation"), *rev'd on other grounds*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989). Similarly, in *Wachtel*, the court relied on *Professional Reactor Operator Soc'y v. United States Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C.Cir. 1991), in which the court declined to defer to Commission's interpretation of the Administrative Procedure Act because the statute applies to all agencies and is not within the Commission's area of expertise. Even more readily distinguished are cases in which the court has declined to defer to an agency's interpretation of a statute whose administration is entrusted to another agency. *E.g., Illinois Nat'l Guard v. FLRA*, 854 F.2d 1396, 1400 (D.C.Cir.1988); *Department of Treasury v. FLRA*, 837 F.2d 1163, 1167 (D.C.Cir.1988). At the same time, the court has acknowledged that where two agencies were charged with administering a statute, there "might well be a compelling case to afford deference if it were necessary for decision [where] both agencies agree as to which of them has exclusive jurisdiction." *CF Indus., Inc. v. FERC*, 925 F.2d 476, 478 n. 1 (D.C.Cir.1991) (dictum); *see also Suramerica de Aleaciones Lamin-*

adas, C.A. v. United States, 966 F.2d 660, 665 n. 6 (Fed.Cir.1992).

Consequently, it appears too facile to conclude that deference is inappropriate simply because more than one agency is involved in administering a statute. The question of whether deference is due more likely depends on the nature of the statute and how Congress has decided it shall be administered. Under FIRREA, Congress provided for joint decisions among the several administrative banking agencies on the allocation of transferred functions. FIRREA § 403(b)(1), 103 Stat. 183, 360-61 (1989) (codified at 12 U.S.C. § 1437 note). The statute instructs how to determine the "appropriate" entity for administering provisions of the statute. *See* 12 U.S.C. § 1813 (q)(4) (the Director of OTS is the "appropriate Federal banking agency" "in the case of any savings association or any savings and loan holding company"). As is evident, Congress intended the several agencies that administer FIRREA to agree regarding their respective roles and exercise their expertise accordingly.

Thus, while *Wachtel* correctly reminds that consideration be given to the fact that more than one agency administers the statute, 982 F.2d at 585 n. 4, deference may nonetheless be appropriate where only expert banking agencies administer the statute and there is no disagreement among them about their respective responsibilities or the agency position under review. *See generally Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52, 110 S.Ct. 2668, 2678-89, 110 L.Ed.2d 579 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). Two circuits

considering OTS's administration of the provision at issue here appear, at least implicitly, to agree. *Simpson v. OTS*, 29 F.3d 1418, 1425 (9th Cir.1994) (applying *Chevron* deference to OTS's definition of "reckless disregard for the law" under § 1818(b)(6)(A)(ii)), *cert. denied*, —— U.S. ——, 115 S.Ct. 1096, 130 L.Ed.2d 1064 (1995); *Akin v. OTS*, 950 F.2d 1180, 1184 (5th Cir.1992) (same, for interpretation of cease and desist power under § 1818(b), and applying "arbitrary and capricious"/abuse of discretion standard to OTS's determination that an individual had been "unjustly enriched" under § 1818(b)(6)(A)(i)). Another circuit has staked out a middle ground. *1185 Ave. of Ams. Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir.1994) (declining to give "full *Chevron* deference to the RTC's interpretation" of 12 U.S.C. § 1821(e) because several other agencies administer FIERRA).

The instant case does not require the court to decide whether *Chevron* deference should apply to OTS's interpretation of § 1818(b)(6)(A) because, as in *Wachtel*, the same result follows whether the court applies *de novo* review or *Chevron* deference. Even without reference to the common law definition of unjust enrichment, the legislative history indicates that Congress did not intend the phrase used in § 1818(b)(6)(A)(i) to encompass the retention of funds owed under a net worth maintenance agreement. *See* Majority Opinion at 218-19 (citing S.REP. No. 19, 101st Cong., 1st Sess. 40 (1989); H.R.REP. No. 54, 101st Cong., 1st Sess. 468 (1989); S.REP. No. 323, 95th Cong., 1st Sess. 7 (1977)). Hence, OTS failed to prove that Rapaport was unjustly enriched.

Accordingly, notwithstanding the majority's interpretation of *Wachtel* and its observations regarding conditions for deference, *id.* at 216-17, I concur in granting the petition for review.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Enforcement Review Committee Resolution
No: 90-49
Dated: July 2, 1990

IN THE MATTER OF:
ROBERT D. RAPAPORT,

Majority Shareholder of
Great Life Savings Association
Sunrise, Florida

OTS Order No. AP 93-95
Dated: November 18, 1993

DECISION AND ORDER

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DECISION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This case arises from a Net Worth Maintenance Agreement between Robert D. Rapaport ("Respondent") and the former Federal Savings and Loan Insurance Corporation ("FSLIC"), operating under the direction of the former Federal Home Loan Bank Board ("FHLBB").

Respondent, the owner of approximately 70 percent of the stock of Great Life Savings and Loan, Sunrise, Florida (the "Association" or "Great Life"), executed a Net Worth Maintenance Agreement (the "Net Worth Maintenance Agreement" or the "Agreement") on March 19, 1985. The Net Worth Maintenance Agreement required him to maintain the net worth of the Association for a period of five years in compliance with 12 C.F.R. § 563.13 or any successor regulation. When the Association's capital fell below the required levels in 1989, the Office of Thrift Supervision ("OTS") demanded that Respondent honor the agreement. Respondent refused to do so.

Based on the record, the Acting Director finds that Respondent's execution of the Net Worth Maintenance Agreement rendered Respondent personally liable for a portion of the Association's net worth, if its net worth fell below required levels during the five year term of the Agreement; that Respondent violated the Net Worth Maintenance Agreemnt by failing to infuse capital into the Association when his obligation to do so under the Agreement was triggered; and that Respondent's failure to infuse capital as required under the Agreement unjustly enriched him. Accordingly, the Acting Director affirms the

conclusions of the Administrative Law Judge with respect to Respondent's liability.

The Acting Director affirms in part and reverses in part the conclusions of the Administrative Law Judge with respect to the amount of Respondent's liability. The Administrative Law Judge concluded that Respondent was liable in the amount of $1,946,000. The Acting Director concludes that Respondent is entitled to his pro rata share of two offsets totalling $585,587 in connection with a classified loan to Pembroke Development Corporation. While the evidence demonstrates that the loan was properly classified as of the conclusion of the 1989 examination of Great Life based on the information available at that time, the weight of the evidence also demonstrates that under 12 U.S.C. § 1818(b)(6), Respondent is entitled to an offset in the amount of 69.9 per cent of $585,587—or $409,325—in connection with this loan on the record of this proceeding. Accordingly, the Acting Director orders Respondent to pay $1,536,675 to the Association in receivership.

II. BACKGROUND

A. *Description of the Charges and Summary of Administrative Proceedings*

In 1990, the OTS placed Great Life into receivership on June 1, 1990. On July 2, 1990, the OTS issued a Notice of Charges and Hearing ("Notice") under section 5(d)(1)(A) of the Home Owners' Loan Act ("HOLA"), 12 U.S.C. § 1461 et seq., and section 8(b) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1811 et seq. The Notice charges that Respondent, in order to obtain federal deposit insurance for the Association, executed a Net

Worth Maintenance Agreement with the FSLIC. According to the Notice, Respondent agreed to infuse capital into the Association should the institution's net worth fall below the levels required by 12 C.F.R. § 563.13 or any successor regulation for a five year period ending March 19, 1990. The Notice further alleges that in November, 1989, the OTS notified Respondent that the Association had failed to meet its regulatory capital requirements as of September 30, 1989 but that Respondent did not infuse capital as required under the Net Worth Maintenance Agreement; and that in January, 1990, Respondent was again notified of the deficiency but failed to cure it. The Notice concludes that Respondent violated the Net Worth Maintenance Agreement by "failing to cause the net worth of Great Life to be maintained at a level required by such Agreement, and/or 12 C.F.R. § 563.13 or successor regulation," and by failing to infuse capital as required under the Agreement. The Notice also concludes that Respondent was unjustly enriched by such violation.

Respondent thereafter brought suit in federal district court for the southern district of Florida to preliminarily enjoin the enforcement proceeding. He sought and obtained a stay of this proceeding from Administrative Law Judge Frederick M. Dolan (the "ALJ") pending resolution of the federal court action. After the district court denied his request for an injunction,[1] Respondent unsuccessfully moved to

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[1] Respondent subsequently refiled a Second Amended Complaint. On August 27, 1993, the district court dismissed all but one of the counts (under the Freedom of Information Act). *See* Second Amended Complaint (May 3, 1991) and Order, Case No. 90-6442-CIV-Moore (August 27, 1993).

dismiss the proceeding herein. Respondent later answered the charges, asserting some 15 affirmative defenses. OTS Enforcement's ("Enforcement") motion to strike these defenses was denied.

On June 8-12, 1992, a hearing was held in Fort Lauderdale, Florida before the ALJ during which the parties presented the testimony of witnesses and introduced documentary evidence. The parties filed post-hearing proposed findings of fact, conclusions of law, memoranda of law, briefs and reply briefs. The ALJ requested and obtained an extension of time in which to issue his Recommended Decision. OTS Order No. AP 93-8 (Jan. 29, 1993).

Respondent again moved to dismiss the action based on the District of Columbia Circuit's decision in *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993). The ALJ referred Respondent's motion to dismiss to the Acting Director of the OTS, who denied it on April 12, 1993.

The ALJ issued a Recommended Decision and Order ("Recommended Decision") on April 13, 1993. Respondent filed exceptions to the Recommended Decision, and Enforcement opposed Respondent's objections. On July 15, 1993, the parties were notified that the ALJ's Recommended Decision had been submitted to the Acting Director for his final decision. 12 C.F.R. § 509.32(b) (1990). By Order dated October 1, 1993 (OTS Order No. AP 93-79), the Acting Director extended the time for rendering his final decision until November 19, 1993.[2]

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[2] Respondent subsequently moved to dismiss this proceeding on the ground that the Acting Director's extension of the time for decision deprives him of jurisdiction to decide the case. The Acting Director is issuing simultaneously a separate decision and order disposing of this motion.

B. *Summary of the ALJ's Recommended Decision*

The ALJ determined: that Respondent was liable for violation of the Net Worth Maintenance Agreement, concluding that Respondent, a majority shareholder of the Association, had entered into a Net Worth Maintenance Agreement in March, 1985 whereby he agreed to be personally responsible for his pro-rata share of any net worth deficiency incurred by the Association during a five-year period; that the 1989 examination of the Association revealed that the Association had a capital deficiency; that the OTS notified Respondent of the deficiency and requested a capital infusion in November, 1989 pursuant to the Net Worth Maintenance Agreement; that Respondent failed to infuse capital as required by the Net Worth Maintenance Agreement; and that Respondent was unjustly enriched by the continued receipt of the benefits of federal insurance after he failed to make the required capital contribution and by the retention of funds or property he was otherwise obligated to infuse into the Association.

The ALJ also rejected Respondent's numerous defenses. In response to Respondent's claim that two loans were improperly classified by the OTS during the 1989 examination—and that his liability under the Net Worth Maintenance Agreement should be reduced accordingly—the ALJ concluded that the loans had been properly classified under generally accepted accounting principles ("GAAP") and thus Respondent was not entitled to any offset. The ALJ based his determination on, among other things, evidence of the examiners' conclusions that the classifications were properly taken, rejecting Respondent's ar-

guments that such evidence was either inadmissible or should be given little weight.[8]

The ALJ also dismissed Respondent's various claims based on state contract law that the Net Worth Maintenance Agreement was unenforceable by the OTS. Because the Net Worth Maintenance Agreement was a written agreement with a federal agency, the ALJ concluded that federal banking law, rather than Florida contract law, should govern its interpretation. In particular, the ALJ found the Fifth Circuit's decision in *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992)—upholding the OTS's enforcement of a similar net worth maintenance agreement—to be controlling precedent.

With respect to Respondent's claim that he could not be liable under the Agreement because he had lost "actual control" of Great Life as a result of regulatory action, the ALJ concluded that Respondent's liability rested solely on his status as a majority shareholder, not with reference to whether he had "actual control" of the Association. The ALJ concluded that the passage of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") did not render the Net Worth Maintenance Agreement unenforceable and that Respond-

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[8] In that regard, Enforcement argued in its post-hearing submissions that only the Association—not Respondent—had standing to challenge the loan classifications because the challenge amounted to a collateral attack on the OTS's appointment of a receiver for the Association in June, 1990. The ALJ rejected Enforcement's position, determining that it had not shown that Respondent would have been able to challenge the appointment decision and that Enforcement had failed to object to Respondent's challenge at the hearing.

ent's claim that the FHLBB/OTS caused the Association financial damage was unsupported.

The ALJ also rejected the agrument that the FHLBB lacked authorty to require Respondent to execute a Net Worth Maintenance Agreement. The ALJ determined further that the post-FIRREA revision of the OTS policy requiring execution of such agreements for *de novo* thrifts applied prospectively and did not invalidate a previously executed agreement. The ALJ concluded that 12 C.F.R. § 567.2 was the successor regulation to 12 C.F.R. § 563.13. Finally, the ALJ rejected Respondent's claim that he was entitled to a jury trial.

In light of the foregoing, the ALJ determined that Great Life's capital deficiency was $2,784,000 as of December 31, 1989 and accordingly recommended that Respondent be ordered to make a capital infusion to Great Life in the amount of $1,946,000, representing 69.9% of that deficiency.

C. *Exceptions to the Recommended Decision*

Respondent has entered exceptions to most of the ALJ's Recommended Decision, reasserting the arguments he raised before the ALJ. Respondent raises five principal arguments, summarized as follows: 1) the OTS is not statutorily authorized to enforce an agreement to which the FSLIC was a party; 2) the OTS has not satisfied the statutory requirements for a cease and desist order; 3) the Net Worth Maintenance Agreement is not an enforceable contract; 4) the OTS administrative proceedings are unconstitutional because Respondent was deprived of a jury trial; and 5) the FSLIC was not authorized to enter into a Net Worth Maintenance Agreement in 1985.

Enforcement filed no exceptions, but relied in opposition to Respondent's exceptions.

III. FINDINGS OF FACT

In April 1984, Respondent, who sat on the board of at least one other thrift, and other investors applied to the Federal Home Loan Bank of Atlanta ("FHLB-Atlanta") for FSLIC insurance of the accounts of the Association, a *de novo* thrift chartered under Florida law. Originally, Respondent intended to acquire approximately 74 per cent of the Association's stock; the attorney representing the applicant, Marvin Rosen, intended to acquire 25 per cent; and the remainder would be held by individual members of the Board.[4] While the Association's application for federal deposit insurance was pending, the FHLBB adopted a policy of requiring majority shareholders of *de novo* state-chartered thrifts to execute net worth maintenance agreements. *See* 49 *Fed. Reg.* 41237 (October 22, 1984). On August 15, 1984, counsel for the applicant notified the FHLBB that the Association agreed to abide by the proposals if codified.[5] The

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[4] There is no indication in the record that the percentage of Great Life stock owned by Respondent changed during the period March 19, 1985-March 19, 1990.

[5] Respondent contends that this letter (OTS Exhibit 4) was inadmissible as hearsay. The ALJ had admitted it into evidence. The Director affirms the ALJ's ruling. First, under the standards relevant to this proceeding—which require that evidence be relevant, material, and nonrepetitive—the Acting Director concludes it was admissible. *See* 12 C.F.R. § 509.24(a) (1990). Moreover, the document would likely have been admissible even under the Federal Rules of Evidence. *See United States v. Norris*, 205 F.2d 828, 829 (2d Cir. 1953) (loan application completed by applicant and main-

record does not demonstrate that until the initiation of this proceeding Respondent ever challenged the FHLBB's requirement that he execute a net worth maintenance agreement.

On March 7, 1985, the FHLBB issued a resolution approving the Association's application for FSLIC deposit insurance, conditioned on, among other things, Respondent's execution and submission of a net worth maintenance agreement.[6] Apparently with the assistance of counsel, Respondent negotiated the terms of the Net Worth Maintenance Agreement and on March 19, 1985, Respondent executed the Net Worth Maintenance Agreement for a five-year term. On May 21,

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tained by bank admissible as record kept by bank in ordinary course of business); *United States v. Ward*, 575 F. Supp. 159, 162 (E.D.N.C. 1983) (food stamp application signed by defendant admissible, under business record exception, citing Federal Rule of Evidence 803(6)).

The ALJ inferred from OTS Exhibit 4 that Respondent had actual knowledge of this letter. Respondent never effectively rebutted this inference, and the Acting Director finds that Respondent had such knowledge.

[6] At the time that the FHLBB passed this resolution, the applicant represented that Mr. Rosen intended to purchase 25 per cent of the Association's stock. Accordingly, the resolution required that Mr. Rosen execute a net worth maintenance agreement as well. The FHLBB was later informed by counsel for the applicant that Mr. Rosen would purchase only 24.6 per cent of the stock and thus did not intend to, and was not required to, execute a net worth maintenance agreement.

Respondent has claimed as a defense that Mr. Rosen breached his professional responsibilities to the Respondent. That is not a valid defense here; to the extent Respondent has a claim against Mr. Rosen he may pursue it in the appropriate forum.

the FHLBB informed FHLB-Atlanta that the Association's application for insurance of accounts had been approved.[7]

The Net Worth Maintenance Agreement provides in substance that, in light of: (1) Respondent's proposal to control 25 per cent or more of the Association's stock, (2) the Association's application for insurance and (3) the FSLIC statement of policy requiring such individuals, groups, or entities to execute net worth maintenance agreements, Respondent "undertakes and agrees pursuant to the requirements of 12 C.F.R. § 571.6(4), or any successor regulation thereto, to maintain the Association's net worth in compliance with the Net Worth Requirement applicable to the Association, computed in accordance with 12 C.F.R. 563.13 or any successor regulation then in effect," by infusing capital into the Association in an amount proportionate to the amount of his stock ownership if the Association's net worth fell below required levels. The Net Worth Maintenance Agreement further provides that "it shall be deemed a contract made under and governed by the laws of Florida," and that it is a "written agreement" entered into with the FSLIC.[8]

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[7] Accordingly, the deposits of Great Life were insured by the FSLIC from approximately May 21, 1985, until approximately August 9, 1989 and by the Savings Association Insurance Fund ("SAIF") of the Federal Deposit Insurance Corporation ("FDIC") from approximately August 9, 1989, through June 1, 1990.

[8] Specifically, the Net Worth Maintenance Agreement provides:

> This Agreement has been duly authorized, executed, and delivered, and constitutes, in accordance with its terms,

Section VI of the Agreement, entitled "Rights and Remedies of FSLIC not Exclusive," provided that "[a]ny and all rights available to the FSLIC under the terms of this Agreement shall be in addition to, and not in lieu of, any other rights or remedies available to the FSLIC in law or equity." The Agreement further provides that:

> "[s]pecifically, the FSLIC is not limited in the event of default to proceeding initially or solely against the shares. The acquiror is personally liable for any Net Worth Deficiency and the FSLIC may elect to proceed against any of the Acquiror's assets if the Acquiror does not satisfy the entire amount of the Net Worth Deficiency within 60 days of the giving of a notice of Default by the FSLIC.

The Net Worth Maintenance Agreement also provided that it would terminate five years from March 19, 1985. In addition, the Agreement states that:

> All references to regulations of the [FHLBB] or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amend-

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a valid and binding obligation of the Acquiror, the Association and the FSLIC. It is understood and agreed that this Agreement is a "written Agreement entered into with the Corporation [FSLIC]" as that phrase is used in Section 407(e) of the National Housing Act, 12 U.S.C. § 1730(e) (1982).

Section 407(e) of the NHA, like current section 8 of the FDIA, authorized the FSLIC to impose a cease and desist order for a violation of a written agreement. 12 U.S.C. § 1730(e).

ments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligations under this Agreement.

Soon after its inception, the Association experienced supervisory difficulties. The FHLBB's 1986 examination of Great Life revealed a net worth deficiency in the Association's first year of operation. Moreover, the Association had an extremely high concentration (59 percent) of commercial real estate loans and was operating beyond the scope of its business plan. In lieu of enforcement action, the FHLBB and the Association entered into a Supervisory Agreement on April 17, 1986, which, *inter alia*, imposed operating restrictions with respect to certain real estate loans, provided for a reduction of total liabilities, and required compliance with the loans-to-one-borrower regulation and development of underwriting standards and loan documentation procedures. As it developed, the Association never recovered from these early problems, and these restrictions remained in effect for the life of the Association.

On October 12, 1989, the OTS-Atlanta commenced a regular examination of the Association. The examination revealed that the Association had roughly $8.4 million in classified assets, which was more than four times the Association's regulatory capital. Concluding that the Association was capital deficient, the OTS found Respondent in default under the Agreement and demanded in writing on November 14, 1989, that Respondent infuse his pro rata share of the Association's capital deficiency—then calculated at $106,248 (representing 69.9% of a $152,000 capital deficiency as of September 30, 1989)—under the Net Worth Maintenance Agreement. Respondent acknowl-

edged receipt of the notice but did not infuse any capital into the Association as a result. By year-end, the Association had a risk-based capital deficiency of approximately $2.8 million (including allowable general reserves).[9]

As a result of the Association's capital deficiency, the OTS obtained the board of directors' consent to merge the Association if the OTS should find a suitable merger partner. On January 16, 1990, the OTS-Atlanta again informed Respondent that the Association was capital deficient; that Respondent was in default under the terms of the Net Worth Maintenance Agreement; and that as a result the OTS could proceed against his personal assets in order to cure the deficiency. Under protest, the Association reclassified certain assets in late March 1990, at the insistence of the OTS.

Again in April, 1990, the OTS informed Respondent that the Association had failed to meet its risk-based capital requirements by $3.236 million (excluding general reserves) as of year-end 1989. It is uncontested that Respondent made no payment under the Net Worth Maintenance Agreement in response to any of the OTS's demands. In June, 1990, the Association was placed into receivership.[10]

IV. ISSUES

This proceeding presents the following issues for the Acting Director's decision. First, the Acting Di-

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[9] Excluding general reserves, the deficiency was approximately $3.2 million.

[10] The Director also adopts additional facts as set forth in the discussion concerning Respondent's entitlement to offset the amount of his liability, *infra* at section V. F. 1. c. i. and ii.

rector must determine whether the FSLIC and the OTS were authorized, respectively, to require the execution of, and seek compliance with, the Net Worth Maintenance Agreement. If so, it must then be determined whether Respondent violated the Agreement.

If he has, the Acting Director must consider whether Respondent's purported lack of "actual control" affects his obligation to honor the Net Worth Maintenance Agreement; whether Florida state contract law or federal common law controls the interpretation of the Agreement, and whether Respondent's common law contract defenses properly apply in this proceeding; whether Respondent is excused from performance under the Net Worth Maintenance Agreement by the OTS's post-FIRREA repeal of the net worth maintenance agreement requirement for *de novo* thrifts; and whether Respondent is entitled to "offset" his liability in connection with two loans he argues were classified improperly.

V. DISCUSSION

A. *Authority to Impose and Enforce the Net Worth Maintenance Agreement*

1. *Authority of the FSLIC to Require Execution of the Net Worth Maintenance Agreement as a Condition to the Grant of Insurance*

Respondent complains that the FSLIC had no authority to require that he execute a net worth maintenance agreement in 1985. The Director rejects this contention. The FHLBB—as the operating head of FSLIC—was statutorily authorized at the time the Net Worth Maintenance Agreement was executed in

1985 to impose appropriate conditions on applicants seeking federal deposit insurance coverage (including state-chartered thrifts), This authority extended to requiring execution of a net worth maintenance agreement.

a. *The FHLBB had jurisdiction over all federally insured associations.*

Under the National Housing Act ("NHA"), 12 U.S.C. § 1724 *et seq.* (1982), the FHLBB—sitting as the operating head of the FSLIC—acted as both regulator and insurer of all federally insured thrifts, including those chartered under state law.[11] 12 U.S.C. §§ 1725(a), 1730.

If a state-chartered institution sought to obtain federal deposit insurance, it voluntarily subjected itself to the regulatory and enforcement jurisdiction of the FHLBB:

> FSLIC insurance, in the case of state-chartered associations, is voluntary and becomes effective only if such institutions apply for it and are accepted. As a condition for eligibility under the program, state-chartered thrifts agree to inspection and regulation by the Board. The Board, moreover, possesses the ultimate authority of terminating an association's insurance if it finds that institution engaging in unsafe or unsound practices.

Lincoln Savings and Loan Ass'n v. Federal Home Loan Bank Board, 670 F. Supp. 449, 453-54 (D.D.C.

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[11] Under the HOLA, the FHLBB exercised direct regulatory and enforcement authority over federally-chartered thrifts, 12 U.S.C. § 1461 *et seq.* (1982), which was largely duplicative of its authority under the NHA.

1987). Accordingly, the deposits of eligible savings and loan associations organized and operated under state laws, such as the Association, were insured by the FSLIC and were subject to its regulation under sections 402 and 403 of the NHA, 12 U.S.C. §§ 1725 (a) and 1726(b) (1982). The FHLBB, as operating head of the FSLIC, was authorized to bring cease and desist proceedings and exercise the full range of enforcement authority under section 407 of the NHA, 12 U.S.C. § 1730, with respect to federally-insured, state-chartered institutions such as the Association. *See, e.g., Saratoga Savings and Loan Ass'n v. Federal Home Loan Bank Board*, 879 F.2d 689, 692 (9th Cir. 1989); *Otero Savings and Loan Ass'n v. FHLBB*, 665 F.2d 279, 288 (10th Cir. 1981); *Lincoln Savings and Loan Ass'n*, 670 F. Supp. at 450-52.

b. *The imposition of a net worth maintenance condition on a grant of insurance was a proper exercise of the FSLIC's authority.*

The FSLIC (under the direction of the FHLBB) was "vested with great discretion in regulating the institutions under its jurisdiction." *FSLIC v. Smith*, 781 F. Supp. 1039, 1046 (E.D. Ark. 1989) (citing former 12 U.S.C. §§ 1464(a) and 1726(b)). Part of that discretionary authority included the ability to require the execution of capital maintenance agreements for federally insured, *de novo* state-chartered thrifts as a means to protect the FSLIC from loss.

The NHA required the FSLIC, under the direction of the FHLBB, to review applications for insurance submitted by state-chartered institutions. 12 U.S.C. §§ 1725, 1726. In so doing, the FSLIC was statutorily required to consider the applicant's financial

condition, including the existence of any capital impairment and the adequacy of the applicant's reserves. *See* 12 U.S.C. § 1726(b) and (c). Based on these statutory provisions, the FSLIC was specifically empowered to impose conditions on the grant of insurance. *See* 12 C.F.R. § 562.7 (1984).[12]

Section 407(e) of the NHA makes clear that Congress intended the FSLIC to be able to impose conditions on the grant of insurance and enter into written agreements thereto. The FSLIC was authorized to pursue enforcement action in the event of a violation of "any condition imposed in writing by the FSLIC in connection with the granting of any application . . . or any written agreement entered into with the [FSLIC]. . . ." 12 U.S.C. § 1730(e)(1). This language would be meaningless if the FSLIC was not empowered to enter into a written agreement in the first instance. *See Kaneb*, 650 F.2d at 82. Moreover, Congress amended section 407 several times between 1970 and 1989. If it had disagreed with the FHLBB's or the FSLIC's interpretation of section 407, it could have revised the section accordingly. *See Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 457 (1978). Accordingly, courts have specifically upheld the FHLBB's authority to impose a capital maintenance requirement, through FSLIC's regulatory authority,

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[12] The FSLIC's authority to do so also comports with the well-settled principle that an agency's statutory authority to approve or deny applications inherently includes the power to condition approval. *See, e.g., Southern Pac. Co. v. Olympian Dredging Co.*, 260 U.S. 205, 208 (1922) ("[t]he power to approve implies the power to disapprove and the power to disapprove necessarily includes the lesser power to condition an approval"); *Kaneb Servs., Inc. v. Federal Sav. & Loan Ins. Corp.*, 650 F.2d 78, 82 (5th Cir. 1981).

under the federal banking laws.[18] *See In re Firstcorp.*, 973 F.2d 243, 250 n.6 (4th Cir. 1992) ("[a] capital maintenance obligation imposed as a condition

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[18] As both the insurer and regulator, the FHLBB's primary concern in the consideration of applications for insurance of *de novo* thrifts was to reduce the risk of loss to newly-chartered institutions, and ultimately, to the insurance fund. 48 *Fed. Reg.* 54320 (Dec. 2, 1983). To that achieve that purpose, the FHLBB in August 1984 proposed to issue a policy statement requiring controlling persons to execute a net worth maintenance agreement. 49 *Fed. Reg.* 33141 (August 21, 1984). Under the proposed net worth maintenance agreements, controlling persons who held in excess of 80 percent of the institution's total stock would be responsible for 100 percent of a net worth deficiency; controlling persons holding less than 80 percent would be responsible for a payment proportionate to the amount of stock held. *Id.* On October 15, 1984, the FHLBB adopted the policy statement as a final rule, including the requirement that controlling person(s) execute a net worth maintenance agreement for a period of at least five years. 49 *Fed. Reg.* 41238 (October 22, 1984), *codified at* 12 C.F.R. 571.6 (1985). Under the policy statement, a "controlling shareholder" was defined as:

> [A]ny individual who will control, or any group of individuals acting in concert to control, or controlling persons for a company which does not have substantial independent economic substance that will control, directly or indirectly, 25 percent or more of the stock of a *de novo* institution.

12 C.F.R. § 571.6(d)(iv)(b) (1985). The policy statement was thus in effect at the time Great Life's application for deposit insurance was approved.

In August, 1988, when the FHLBB revised its policies regarding net worth maintenance agreements so that they would be capped, or limited, at a predetermined amount. 53 *Fed. Reg.* 31761, 31762 (August 19, 1988). This policy change, as well as others that were undertaken after 1988, applied prospectively only and did not alter Respondent's obligation

of FHLBB's approval of an acquisition, however, is clearly enforceable by OTS under settled law"); *see also Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992).[14] Thus, the FSLIC, under FHLBB's direction, was permitted to require as a precondition to the grant of federal insurance to the Association that a controlling person, such as Respondent, execute such a "written agreement" as a reasonable means to protect the insurance fund from loss.

2. *Authority of the OTS to Enforce the Net Worth Maintenance Agreement in its Capacity as Primary Federal Regulator*

One of the central reforms in FIRREA was to divide the dual regulatory and insurance functions held by FSLIC and its operating head, the FHLBB, among separate regulatory and insurance agencies. The regulatory and enforcement powers of FSLIC fell to the OTS. The OTS was thus statutorily authorized to take enforcement action against Respondent, in its capacity as "the appropriate federal banking agency," [15]

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to honor the net worth maintenance agreement imposed on him in accordance with the 1984 policy. For later revisions to the net worth maintenance policies of the FHLBB and the OTS, see Thrift Bulletin No. 5 (October 19, 1988); 54 *Fed. Reg.* 49,418 (November 30, 1989); and Thrift Bulletin No. 5a (April 12, 1990).

[14] *Cf. Board of Governors of the Federal Reserve System v. Lincolnwood Corp.*, 439 U.S. 234 (1978) (Federal Reserve Board may use approval process to require infusion of additional capital into subsidiary).

[15] Section 3(q)(4) of the FDIA, 12 U.S.C. § 1813(q)(4), provides that the "appropriate federal banking agency" is the Director of the OTS in the case of any savings association or any savings and loan holding company.

based upon a violation of "a written agreement entered into with the agency." See 12 U.S.C. § 1818 (b). The Net Worth Maintenance Agreement in this case was created by the FHLBB and founded on FSLIC's regulatory and enforcement authority. FIRREA, however, abolished the FSLIC and transferred its regulatory and enforcement authority over state-chartered, federally-insured thrifts to the OTS. The FSLIC net worth regulations that were cited in the Net Worth Maintenance Agreement were transferred to the OTS.[16] The OTS thus is the appropriate entity to enforce a "written agreement with the agency" in its role as primary federal regulator of the Association and affiliated persons such as the Respondent.

Respondent complains that because the Agreement was required by the FSLIC, the OTS cannot now

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[16] The capital regulations were promulgated pursuant to FIRREA § 301, which amended the HOLA to add section 5(t), 12 U.S.C. § 1464(t), and required the OTS to promulgate regulations by November 7, 1989, prescribing uniformly applicable capital standards for all savings associations. These regulations were published at 12 C.F.R. Part 567 and became effective on December 7, 1989. The preamble to these regulations, published in the Federal Register on November 8, 1989, states that:

> The [OTS] has reorganized and relocated its capital regulations, which appeared at §§ 561.13, *563.13*, 563.14, 563.14-1, and 563.47 at the time of the 12/88 proposal, into a new part 567. It believes this new structure will make it easier for those applying or subject to these capital regulations to determine and understand their content.

54 *Fed. Reg.* 46845, 46847 (November 8, 1989) (emphasis added). Thus, the new capital regulations were intended to, and did, replace the former net worth requirements.

enforce it because OTS is not a successor to the FSLIC; rather, he claims, the FSLIC's insurance functions were transferred to the FDIC. Respondent is correct only in that FIRREA repealed the National Housing Act (thereby eliminating the FSLIC) and transferred the insurance fund and its administration to the FDIC. Respondent's argument ignores, however, the fact that the FSLIC also performed regulatory and enforcement functions over federally-insured institutions. *See* 12 U.S.C. §§ 1725(a), 1730 (1982).

FIRREA divided the FSLIC's responsibilities. In place of the FSLIC insurance fund, it created the SAIF, a new thrift insurance fund under the administration of the FDIC. 12 U.S.C. § 1821(a)(6). The FSLIC's regulatory functions—the examination, supervision, and regulation of all federally-insured savings associations—were transferred to the OTS. 12 U.S.C. § 1463(a)(1); § 1464(d)(2)(A). FSLIC's enforcement authority to institute cease and desist proceedings against state-chartered thrifts under the NHA was transferred to the OTS. *Id.; see also Akin*, 950 F.2d at 1182 n.2 ("[t]he FIRREA dissolved the FSLIC and created the OTS to act as the principal regulator of savings and loan associations"); *In re Keating*, OTS Decision and Order No. AP 91-20 at 9 (May 11, 1991); 54 Fed. Reg. 46845, 46846 (November 8, 1989) (FIRREA "established the [OTS] as the primary federal banking regulator for all savings associations and savings and loan holding companies.")[17]

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[17] Although this issue was not raised by the parties, the Director notes that there is an apparent error in the heading to the Title 12, USC and USCA versions of § 1463(a), which

Respondent contends that the repeal in FIRREA of the NHA extinguished FSLIC's regulatory and enforcement authority and prevented it from being passed on to the OTS. Respondent relies on the provision in FIRREA that powers not expressly transferred to another entity would remain with the OTS, unless otherwise repealed by FIRREA. FIRREA § 301, HOLA § 3(e), 12 U.S.C. § 1462a(e)(1). Section 1462a(e) does not apply here, however, because the regulatory and enforcement authority over state-chartered, federally-insured thrifts was in fact *expressly* transferred to the OTS under 12 U.S.C. § 1463(a)(1).

There can be no serious dispute that this agreement survived FIRREA. Congress did not contemplate that agreements that had been entered into with the FSLIC would simply disappear after August 9, 1989. FSLIC's authority to enforce written agreements under section 407 of the NHA was expressly preserved by the savings provision of FIRREA, § 401(f). That section provides that the abolition of the FSLIC by FIRREA § 401(a):

> . . . shall not affect the validity of any right, duty, or obligation of the United States, the

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are entitled "Federal savings associations." As the actual language of this provision makes clear, this section applies to both federal and state-chartered institutions. This section also separately defines "savings association" and "federal savings association." § 1462(4) and (5).

This interpretation comports with the legislative history as evidenced by the conference report on FIRREA. See Conf. Rept. to accompany H.R. 1278 ("The Director [of OTS] is responsible for the examination and supervision of *all* savings and loans . . .").

> Federal Savings and Loan Insurance Corporation, or any other person, which—
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> (A) arises under or pursuant to any section of title IV of the National Housing Act [12 U.S.C. § 1724 *et seq.*], and
>
> (B) existed on the day before the date of the enactment of this Act [Aug. 9, 1989].

FIRREA § 401(f). *See also* 54 *Fed. Reg.* 34637 (August 21, 1989) (OTS adopts and ratifies, among other things, all pre-FIRREA regulations, orders, resolutions, enforcement proceedings, agreements and other determinations of the FHLBB and FSLIC not transferred elsewhere); 1 U.S.C. § 109 (general savings statute). Accordingly, the Net Worth Maintenance Agreement was not rendered unenforceable by the passage of FIRREA.

Respondent contends in addition that the agency is estopped from finding that the OTS inherited FSLIC's regulatory and enforcement function because in the related district court litigation, the OTS argued that it was not a sucecssor to a party to the contract since FSLIC's insurance function was transferred to the FDIC by FIRREA.[18] Respondent's ar-

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[18] The OTS argued in the district court that:

> The Amended Complaint is rife with the incorrect assumption that Defendant Ryan, as OTS Director, is the successor in interest to the FSLIC *as a party* to the Net Worth Maintenance Agreement . . . The Director's authority to enforce the agreement, however, derives not from any status as a successor in interest to FSLIC as *a contracting party*, but rather from his *statutorily-granted* power under FIRREA to enforce conditions imposed in connection with Great Life's application for federal deposit insurance and to enforce FSLIC's written

gument is of no weight, considering the context of the related litigation. The purpose of Respondent's suit was to interrupt the instant administrative proceeding. In an attempt to evade the express jurisdictional bar on such suits, *see* 12 U.S.C. § 1818(i)(1), Respondent characterized his claims as sounding in contract. The district court rejected this approach and dismissed Respondent's contract claims under section 1818(i)(1). It was thus unnecessary for the court to consider the OTS's subsidiary argument that, assuming Respondent's claims were in contract, then under section 215 of FIRREA, 12 U.S.C. § 1821a(a), they were a liability of the FSLIC Resolution Fund. This position is wholly consistent with the Acting Director's conclusion that the OTS has succeeded to the FSLIC's *regulatory* and *enforcement* authority.[19]

> agreements with controlling shareholders like Rapaport. . . . The OTS' authority to enforce FSLIC's Net Worth Maintenance Agreement with plaintiff thus is *statutory, not contractual*. . . .

OTS's Memorandum of Law in Support of Motion to Dismiss and Motion for Summary Judgment, dated September 27, 1990, at pp. 31-33 (emphasis added) (citations omitted).

[19] The Acting Director also rejects Respondent's claims that enforcement of the Net Worth Maintenance Agreement is arbitrary and capricious because such agreements allegedly have not been enforced against others. The net worth maintenance cases cited herein for their precedential value demonstrate that enforcement action was taken against individuals or entities that committed to maintain an institution's net worth and subsequently failed to honor that commitment. *See, e.g., Wachtel,* 982 F.2d 581; *Akin,* 950 F.2d 1180; *Firstcorp,* 973 F.2d 243; *see also In re Christo,* OTS Order No. AP 93-69 (August 27, 1993). Accordingly, the OTS has in fact sought enforcement of commitments to infuse capital where, in its prosecutorial discretion, it has concluded the facts warrant such action.

B. *Standards for Issuing a Cease and Desist Order*

Section 8(b)(1) of the FDIA provides that if, in the opinion of the "appropriate federal banking agency," an insured depository institution or an institution-affiliated party has violated any written agreement entered into with the agency, or any condition imposed in writing in connection with the consideration of any application, the agency may issue and serve a notce of charges in respect thereof. 12 U.S.C. § 1818(b)(1). If, upon hearing, the agency finds that any violation specified in the notice of charges has been established, the agency may order the institution or party to cease and desist from the violation. Accordingly, the Director is authorized to issue a cease-and-desist order upon finding that Respondent entered into a Net Worth Maintenance Agreement and violated the terms of such agreement. In addition, upon a finding that an institution-affiliated party acted in reckless disregard of the law or was unjustly enriched by his misconduct, the OTS may also order the respondent to take affirmative action to correct the condition resulting from any such violation. 12 U.S.C. § 1818(b)(1) and (6); *see also Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993); *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992).

C. *Respondent's Violation of the Net Worth Maintenance Agreement*

The facts of this case amply demonstrate that the agency imposed, and Respondent expressly assumed, a commitment to maintain the net worth of the Association for a period of five years. Here, Respondent entered into an express "written agreement" under § 1730(e) which is enforceable by means of a

cease and desist order.[20] The Association fell below its net worth requirement as of September 30, 1989, thus triggering Respondent's default under section II of the Agreement. Pursuant to section V(A)1 of the Agreement—which required Enforcement to notify Respondent in the event of a default—Enforcement first informed Respondent of a default on November 14, 1989. By letter of that date, Enforcement informed Respondent that he was then responsible to make a capital infusion in the amount of 69.9 percent of a capital deficiency of $152,000. The letter also stated that Respondent was "also responsible for providing the institution with additional capital if the regulatory capital deficiency reoccurs." By letter dated November 30, 1989, Respondent acknowledged receipt of the November 14 notice but failed to indicate whether he would infuse capital as requested.

OTS notified the Respondent again in January that the Association was capital deficient and that he was obligated under the Agreement to infuse capital. OTS again notified Respondent in April of 1990 of its calculations of the amount of the deficiency.[21] Re-

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[20] *Cf. Wachtel,* 982 F.2d at 584 n.2 ("OTS . . . has not pointed to any representation by the petitioners that affirmed an obligation enforceable through a cease and desist order as opposed to a less formal obligation.")

[21] The agency is not required to provide the Respondent with multiple, updated notices of the deficiency calculation. Rather, under the Agreement, the OTS is responsible for notifying Respondent in the event of a default. *See* Section V(A); *see also In re Akin,* OTS Decision and Order No. AP 90-4009 (December 24, 1990), *aff'd sub nom. Akin v. OTS,* 950 F.2d 1180 (5th Cir. 1992).

Nor is the OTS's April, 1990 letter (OTS Exhibit 21) inadmissible as part of an admission made during settlement

spondent did not make the requisite capital infusion. After Respondent failed to honor his commitment, the institution was placed in receivership.

Under the applicable precedent, it is clear that a violation of a written agreement occurs when a party refuses to make payment pursuant to the terms of that agreement. *See Akin*, 950 F.2d 1180. *Cf. In re Firstcorp*, OTS Decision and Order No. Ap 92-125 at pp. 15-16 (November 20, 1992) (violation of condition imposed in writing occurs when party refuses to honor commitment). The Acting Director concludes that Respondent, having failed to make the requisite capital infusion as he committed to do under the Net Worth Maintenance Agreement, is in continuing violation of a written agreement and that a cease and desist order may properly issue under section 8(b) of the FDIA.[22]

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negotiations. First, the letter meets the regulatory standards of admissibility under 12 C.F.R. § 509.24(a). Moreover, it is likely admissible even under the Federal Rules of Evidence because it was not a statement made by Respondent. Excluding the evidence on such grounds does not further the purposes of the rule, which is to foster settlement of actions where possible. *See* note to F.R.E. 408. Indeed, the cases cited by Respondent in support of exclusion reflect attempts by a declarant to exclude admissions made in furtherance of settlement, which were then used against the declarant at trial. Here, no statement has been made by the Respondent under the guise of settlement which the OTS is seeking to use against the Respondent as an admission at trial.

[22] The fact that the Association is in receivership is not a defense to Respondent's compliance with the Agreement, because the injury that the Net Worth Maintenance Agreement was intended to prevent has in fact already been sustained by the insurance fund and, ultimately, the taxpayer. *See Akin*, 950 F.2d at 1185; *In re Firstcorp*, 973 F.2d at 249.

1. *Respondent's Control Defenses*

Respondent argued before the ALJ and repeats in his exceptions that the Net Worth Maintenance Agreement cannot now be enforced against him because, at least as of October, 1988, he could no longer be deemed to have "actual control" of the institution in light of the following intervening events.

First, the FHLBB imposed a Supervisory Agreement on Great Life in 1986—during the first full year of its operation. The Supervisory Agreement was imposed by the FSLIC in lieu of enforcement action and made the Association subject to, *inter alia*, operating restrictions with respect to commercial real estate loans, a reduction of total liabilities, a requirement of compliance with the loans-to-one-borrower regulation, and the development of underwriting standards and loan documentation procedures. In addition, the FHLBB designated the Association as a "troubled institution" in January 1989 and imposed additional restrictions on the institution.

Second, in October 1988, Respondent—in apparent resolution of another, independent FHLBB enforcement proceeding against Respondent regarding his involvement with another thrift—entered into an undertaking with the FSLIC. The undertaking, to which Respondent consented, removed Respondent from the board of directors of that thrift and prohibited him from voting for a director in any thrift in which he owned stock without first obtaining clearance from the FHLBB.

Finally, in September 1988, the state of Florida notified Respondent and the institution that Respondent was specifically prohibited from obtaining access to confidential Association files. Under section 665.042

of the Florida Savings and Loan Associations Code, dissemination of such materials to individuals other than Association directors, officers and employees, with limited exceptions, is punishable as a felony. *See* Fla. Stat. Ann. § 665.042 (West 1984).

The Director rejects Respondent's novel proposition that the imposition of appropriate supervisory sanctions by authorities of competent judisdiction extinguished his obligation to comply with the Net Worth Maintenance Agreement. First, the statutory and regulatory definitions of "control" at the time Respondent executed the Net Worth Maintenance Agreement extended to those who had the ability to vote 25 per cent or more of the thrift's stock. *See* 12 U.S.C. § 1730(q)(9) (1984); 49 *Fed. Reg.* 41238 (October 22, 1984), *codified at* 12 C.F.R. 571.6 (1985); *accord* FHLBB, *Annotated Manual of Statutes and Regulations* at ¶¶ 1048, 1436 (5th ed. Jan. 1985). *See also In re Firstcorp*, 973 F.2d at 250. From the institution's inception, it is undisputed that Respondent owned 69.9 per cent of the Association's outstanding voting shares and he did not offer evidence that he was prevented from voting those shares or that he disposed of shares so that his ownership fell below 25 per cent. Accordingly, as he was aware when he executed the Net Worth Maintenance Agreement in 1985, Respondent was deemed to "control" the Association by virtue of his stock ownership as a matter of law.[28]

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[28] The Acting Director notes that the record suggests that Respondent did in fact exercise a great deal of influence over the institution. A September 23, 1988 letter from the FHLBB-Atlanta to the Association's Board of Directors (Respondent's Exhibit 315) states that "[t]he level of influence exerted by majority shareholder Robert Rapaport over the management and the board of directors of Great Life is such that Mr. Rapaport was acting as a de facto director in violation of the

Thus, arguments based on Respondent's purported lack of "actual control" are irrelevant. Even if they were not, however, Respondent has not shown that the Supervisory Agreement—which was imposed by the FHLBB to correct the Association's failure to comply with thrift laws, as an alternative to enforcement action—actually interfered with any "control" he exercised. In *Firstcorp*, the Fourth Circuit rejected the argument that because a thrift was operating under supervisory restrictions, the holding company had necessarily lost "control" of the institution. 973 F.2d at 250-251. Similarly, the Respondent here did not lose "control" of the Association because the FHLBB took supervisory action in an attempt to ensure that the institution was being operated in a safe and sound manner.

Nor has Respondent demonstrated that the 1988 enforcement undertaking ever actually interfered with his voting rights in the Association. Respondent was not deprived of his right to vote; he was merely required to obtain the FHLBB's approval before voting for any member of the board of directors of an insured institution in which he owned stock. This requirement did not substantially change the restriction that Great Life was operating under because—even independent of the undertaking—the OTS had the supervisory authority to approve candidates for the Association's board of directors for a period of three years *after* the first fiscal year of the Association's operation. *See* 12 C.F.R. § 571.6(d). At the time the enforcement action was taken against Re-

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Management Interlocks Act." It is the fact of the amount of his stock ownership, however, that is material for purposes of the Agreement.

spondent in October, 1988, he did not have an unfettered right to select the composition of the board of directors.[24] Respondent's rights thus were not, even in theory, materially changed by the "voting restriction." Finally, Respondent makes no attempt to demonstrate that he ever tried to vote—and that such attempt was actually restricted by the FHLBB or the OTS—after the consent was executed in 1988. Nor did he present any evidence demonstrating that he was prevented from receiving proxy solicitations or other shareholder materials.

Respondent's violation of the Florida state statute is not probative of any issue in this case. The fact that the state of Florida determined that Respondent had improperly been given access to confidential, internal Association documents (in violation of Florida law), and ordered the institution to restrict Respondent's access thereto, demonstrates little more than the state's legitimate concern to enforce its banking laws. Its mandate to the Association and Respondent to obey the law are not relevant to the issue of control in this case, which is established by proof of 25 per cent ownership of an institution's outstanding stock.

2. *Respondent's State Law Contract Defenses*

Respondent has argued that because the Net Worth Maintenance Agreement states on its face that it is

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[24] Even today, the OTS must pass on the qualification of directors of certain thrifts, including *de novos*. *See* 12 U.S.C. § 1831i; *see also* 58 *Fed. Reg.* 45421 (August 30, 1993), to be codified at 12 C.F.R. § 574.9. As these provisions make clear, because of the significant federal interest, and the existence of federal deposit insurance, no owner of thrift stock has an unrestrained right to elect directors.

a contract under the laws of the state of Florida, he is entitled to assert state common law defenses against the OTS, such as failure of consideration, failure to mitigate damages, unclean hands and failure to act in good faith. He also argues that the Net Worth Maintenance Agreement, as a contract, must be supported by consideration and that there was no consideration for the Agreement.

First, Respondent wholly ignores the "written agreement" language in the Agreement, despite the fact that the OTS is seeking to enforce the Agreement in its capacity as primary federal regulator. As *Akin* makes clear, the obligations of a respondent in such a case are governed by the federal enforcement statutes as construed by the federal courts. *See Akin*, 950 F.2d at 1183-84. State contract law is wholly irrelevant for this purpose. *See Groos Nat'l Bank v. Comptroller of the Currency*, 573 F.2d 889, 896 (5th Cir. 1978). Even the Agreement itself makes clear that "[a]ny and all rights or remedies available to the FSLIC under the terms of this Agreement shall be in addition to, and not in lieu of, any other rights or remedies available to the FSLIC in law or equity." *See* Section VI. Thus, the Agreement expressly contemplates that the FSLIC may take action against the Respondent independent of its status as a party to the Agreement. Accordingly, an action by the OTS seeking enforcement of the Agreement in the exercise of the OTS's regulatory authority is properly governed by federal law.

Nor can the obligor on a net worth maintenance agreement bypass the banking enforcement statutes by asserting, under the language of the net worth maintenance agreement, that the document may be construed only as a contract. This interpretation,

which gives no meaning to the "written agreement" language of the Net Worth Maintenance Agreement, is incorrect as it wholly ignores the regulatory authority of the federal banking agencies. Moreover, Respondent's interpretation is even inconsistent with general principles of contract construction, which disfavor interpretations that deprive a particular provision of any meaning.

Respondent has offered no reasonable reconciliation of these two clauses. In contrast, the Acting Director's conclusion does not render meaningless the "contract" language in the Net Worth Maintenance Agreement. There may be circumstances where state contract law may properly speak to the rights of the parties or their succesors because federal law does not. For example, the Agreement provides that in the event of an uncured default, the acquiror must convey his shares of Association stock to the FSLIC. Particularly in the case of a third party purchaser, there may be an issue of ownership rights governed by state law. This is not the posture of the case before the Acting Director, however.[25] The Director declines to interpret the Agreement against the weight of authority concerning the ability of a federal regulatory agency to take enforcement action under federal law and finds that state contract law does not govern the resolution of this case.

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[25] Nor is the issue of whether the FDIC or the Resolution Trust Corporation ("RTC") may enforce the Agreement. The Acting Director notes, however, that concurrent jurisdiction among several of the banking agencies for related purposes is part of the overall scheme of the banking laws. *See, e.g., In re Keating*, OTS Decision and Order No. AP 91-20 (May 11, 1991).

Notably, even if Respondent were permitted to raise his state contract law defenses—failure of consideration, failure to mitigate damages, unclean hands and failure to act in good faith—he has not sustained his burden of proof on any of them. With respect to his failure of consideration defense, *Akin* and *Groos* make clear that consideration is not necessary to sustain a written agreement with the federal government; if it were, however, there is sufficient consideration in the fact that Respondent obtained insurance from the FSLIC, and the FHLBB obtained a personal financial commitment from Respondent.

As to the remaining defenses, the ALJ correctly concluded that equitable defenses against the federal government, acting in its sovereign capacity, are strictly limited.[26] *See SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 73 (D. Conn. 1988) *citing Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) *and Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984). Among other things, Respondent must show that "the agency's misconduct [was] egregious and the resulting prejudice to the defendant [rose] to a constitutional level." *Id.* The record is devoid of any such evidence.[27] The Acting Director rejects Re-

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[26] For example, Respondent has not demonstrated entitlement to the affirmative defense of failure to mitigate damages. *See, e.g., FSLIC v. Burdette*, 718 F. Supp. 649, 663-64 (E.D. Tenn. 1989). Nor does the OTS owe Respondent a duty of good faith. *See FSLIC v. Locke*, 718 F. Supp. 573, 582 (W.D. Tex. 1989). Similarly, Respondent's defense of unclean hands must fail. *FDIC v. Baker*, 739 F. Supp. 1401, 1404-1407, 1409 (C.D. Cal. 1990).

[27] Respondent's arguments in this regard also assume that the regulators are responsible, at least in part, for the Association's losses. This assumption has been rejected by the

spondent's reliance on state law cases between private parties as inapposite.

3. *Respondent's Regulatory Defenses*

Respondent claims that the OTS has not made a case for a cease and desist order because, *inter alia*, the Net Worth Maintenance Agreement lapsed by regulatory amendment as of November 30, 1989. See 54 *Fed. Reg.* 49411, 49418, 49674-75 (November 30, 1989) (amending 12 C.F.R. § 571.6). This amendment stated that controlling shareholders of state-chartered thrifts would no longer be required to execute net worth maintenance agreements as part of the application for insurance. Enforcement responded that this amendment was to be applied prospectively, not retroactively, to *de novo* institutions. The ALJ did not consider whether the regulation lapsed by amendment prior to enforcement because the issue had not been before him.

The Acting Director concludes that Respondent's pre-existing net worth maintenance obligation is unaffected by this amendment. Respondent undertook, pursuant to 12 C.F.R. § 571.6(d)(iv) and any successor regulation to maintain the Association's net worth for a period of five years. The revision to section 571.6(4) that Respondent cites was explicitly declared by the agency to have only prospective application: "Section 571.6 is being revised to apply only to *applications* for *de novo* federal charters and no longer to apply to *application* for FSLIC insurance of accounts for *de novo* state-chartered institutions." 54 *Fed. Reg.* at 49418 (emphasis added). Thus, as

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Supreme Court. *See United States v. Gaubert*, 499 U.S. 315 (1991).

the amendment changed only the application process for future agreements, not existing net worth maintenance agreements, it is clear that the revision was intended to have only prospective effect. *See Kaiser Aluminium & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990) (where intent as to retroactive or prospective application is clear, it governs). Accordingly, this regulatory amendment does not relieve Respondent from his obligation under the Net Worth Maintenance Agreement.[28]

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[28] The Acting Director also rejects Respondent's claim that the successor capital regulations to 12 C.F.R. § 563.13 were issued without notice and comment. On December 15, 1988, the FHLBB issued a risk-based capital proposal which it promulgated for a 90-day public comment period. *See* 54 *Fed. Reg.* 46845, 46846, (November 8, 1989). The FHLBB held public hearings on the proposal on February 9 and 10, 1989. *Id.* Because FIRREA became effective August 9, 1989, the OTS reopened the comment period on the proposal from September 12 to 22, 1989, in order to allow for additional public comment based on the capital changes mandated by FIRREA. *Id.*

The regulatory savings provision of FIRREA, section 401(h), provides that orders, resolutions, determinations and regulations of the FHLBB in effect on August 9, 1989 were to remain in effect until modified, terminated, set aside or superseded in accordance with applicable law by the appropriate successor agency. As the OTS noted when it adopted the new capital regulation as an interim final rule in November, 1989, the FHLBB's "notice of proposed rulemaking on regulatory capital is such a resolution and the [OTS] has succeeded to that notice." *Id.* Accordingly, the public was given notice and an opportunity to comment on the proposed regulatory revisions.

D. *Right to a Jury Trial*

The Acting Director rejects as meritless Respondent's argument that he was denied the right to a jury trial under the Seventh Amendment. *See, e.g., Akin*, 950 F.2d at 1186. The Acting Director's determination also comports with Supreme Court jurisprudence, which instructs that the right to a jury trial under the Seventh Amendment attaches only to those civil actions recognized under eighteenth-century common law and not to claims based on "public rights." *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 & n.4 (1989); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454-55 (1977). The instant proceeding is founded on a section of the Federal Deposit Insurance Act—for violation of a written agreement with the agency—not on any cause of action which is grounded in eighteenth-century common law. Under the weight of authority, Respondent is not entitled to a jury trial.

E. *Unjust Enrichment*

The Acting Director finds that Respondent has been unjustly enriched by his violation of the Net Worth Maintenance Agreement. *See In re Akin*, OTS Decision and Order No. AP 90-4009 (December 24, 1990), *affirmed sub nom. Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992) and *In re Akin*, (on remand), OTS Decision and Order No. AP 92-138 (November 25, 1992).

In *Akin*, the respondent entered into a net worth maintenance agreement with the FSLIC, in lieu of enforcement action, which required him to maintain the net worth of TexasBanc Savings FSB ("Texas-

Banc") at the level required by section 563.13(b) or any successor regulation thereto and to infuse additional capital if the net worth of TexasBanc fell below its minimum net worth requirement. Akin, however, failed to infuse capital in the amount of the deficiency. The OTS concluded the appropriate remedy for Akin's violation of the net worth maintenance agreement was a cease and desist order requiring Akin to infuse capital into TexasBanc. The OTS also concluded that Akin had been unjustly enriched by retention of funds due to TexasBanc when a default was triggered under the agreement. The Fifth Circuit upheld the OTS's enforcement of the net worth maintenance agreement.

Like Akin, Respondent voluntarily entered into the Agreement to obtain a benefit from the federal government. In *Akin*, the purpose was to avoid enforcement consequences; here, Respondent did so as a majority shareholder so that the Association could commence operations enjoying the benefits of federal insurance. Like Akin, Respondent refused to honor his commitment when the institution's capital fell. Like Akin, Respondent's failure to infuse capital contributed to the demise of the Association. Finally, like Akin, Respondent has been unjustly enriched by his failure to comply with the Agreement, by retaining funds or property that belong to the Association while the Association received the benefits of deposit insurance.[29]

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[29] The ALJ concluded that Respondent was unjustly enriched by receiving the benefits of federal insurance without honoring the net worth maintenance agreement (Recommended Decision at p. 2). Specifically, the ALJ found that Respondent had been unjustly enriched "since, as in *Akin*,

Respondent's attempts to distinguish *Akin* are not persuasive.[30] Accordingly, the Acting Director concludes that the appropriate remedy for Respondent's violation of the written agreement is enforcement of the Agreement and imposition of the requirement that Respondent infuse capital into the Association in receivership.

[F.] *The Appropriate Remedy*

1. *The Amount of Respondent's Liability*

The proper amount of Respondent's liability under the Agreement, however, is also a matter of dispute. The ALJ adopted Enforcement's argument that the loan classifications were proper under generally accepted accounting principles.

Respondent asserts that he is entitled to an "offset" in the approximate amount of $1.5 million, on the theory the OTS applied improper accounting standards in its evaluation of certain loans during the 1989 examination of Great Life. In challenging the OTS's classifications of two disputed loans (Pembroke and Louisville), Respondent also challenges the deference the ALJ accorded the examiners' testimony, and the admissibility of certain evidence reflecting those conclusions.

Because it appears that the OTS examiners applied the proper criteria under the facts of this case, the

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he has unlawfully retained funds owed to Great Life in receivership." (Recommended Decision at pp. 50-51). *See also* ALJ's Conclusion of Law No. 11.

[30] For example, it is not significant that Respondent, unlike Akin, was not an officer or director; rather, what is significant is that he is an institution-affiliated party who owned more than 25 per cent of the Association's stock.

Acting Director finds that the ALJ properly accorded deference to the OTS examiners' determinations, as reflected in documentary evidence and oral testimony at hearing, in concluding that the subject loan classifications were properly taken at the time of the examination. The Acting Director departs from the ALJ's Recommended Decision, however, insofar as the ALJ failed to consider evidence adduced (in connection with certain offsets sought in connection with the loan to Pembroke Development Corporation) in calculating the amount of liability under 12 U.S.C. § 1818(b)(6)—an issue which goes beyond the propriety of the loan classification. Based on the evidence in this record, the Acting Director concludes that Respondent is entitled to his pro-rata share of two offsets in connection with the Pembroke loan in the amounts of $485,587[31] and $100,000, respectively—equalling $339,425 and $69,900. The Acting Director affirms the decision of the ALJ that Respondent is not entitled to an offset in connection with the Louisville loan.

a. The Examiners' "Expert" Status

Respondent has claimed that the Examiner-in-Charge ("EIC") of the 1989 examination does not qualify as an expert because he had been employed as a bank examiner for only two years and had served as EIC for only two examinations. Respondent also asserts that the EIC was biased and thus his conclusions must be dismissed.

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[31] This number is derived by subtracting the OTS's original fair value estimation of $2,464,413 from the OTS's revised fair value estimation of $2,950,000. *See* c. i., below.

It is well settled that bank examiners are "experts" on the subject of loan classifications, and their predictive judgments should generally be given deference in subsequent administrative proceedings. *See Sunshine State Bank v. Federal Deposit Ins. Corp.*, 783 F.2d 1580, 1582-83 (11th Cir. 1986). *Cf. Franklin Savings Ass'n v. OTS*, 934 F.2d 1127, 1146 (10th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1475 (1992) (predictive judgments are particularly within expertise of agency).

The presumption of deference is rebuttable, however. To determine if the examiners' predictive conclusions regarding loan classifications should be accorded deference, the ALJ should analyze: (1) whether the facts the examiners relied on were erroneous and (2) whether the conclusions the examiners arrived at were reasonable in light of the evidence. *See, e.g., Sunshine State Bank*, 783 F.2d at 1582; *In the Matter of Anderson County Bank, Clinton, Tennessee*, Dkt. No. FDIC 89-235a (Prentice Hall FDIC Enforcement Decisions and Orders dated May 21, 1991).

As discussed in greater detail with respect to the specific classifications below, the Acting Director concludes that the ALJ properly evaluated this record under the *Sunshine* test and appropriately accorded deference to the conclusions of the examiners.

Respondent urges, in lieu of the test expressly stated in *Sunshine*, that because the EIC supervising the Association's 1989 examination did not have as much experience as the *Sunshine State Bank* examiners, he is not entitled to deference. Such an interpretation distorts the import of *Sunshine*. The EIC received specific training, has thoroughly reviewed and is knowledgeable concerning the relevant loan

files at issue and, in his occupation as a thrift examiner, deals with examination issues on a daily basis.[32] Under the *Sunshine* standard, seniority alone is not dispositive: rather, the analysis hinges on whether there is error in the examination at the time it was conducted. Once it is established that the examiner is in fact a professional regulatory examiner, who has been specially trained for that employment, and who possesses expertise on the loan classifications based on the examiner's familiarity with the loans at issue, the issue of extent of experience must be subordinate to an evaluation of whether demonstrable error was committed in the examination process. Accordingly, the examiner's conclusions may be properly questioned not by reference to seniority alone but by either demonstrating that the information upon which the examiner relied was erroneous; or that his conclusions did not flow from the facts.

Thus, to the extent that Respondent attacks the examiners' conclusions herein, the Director finds that Respondent must attack them directly under the *Sunshine* test, not collaterally.[33]

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[32] Respondent implies that because the EIC is not a lawyer or CPA, he cannot be a qualified examiner. A bank examiner's expertise, however, need not extend to areas such as litigation, bankruptcy or appraisals. *In the Matter of Anderson County Bank, Clinton, Tennessee,* Dkt. No. FDIC 89-235a (Prentice Hall FDIC Enforcement Decisions and Orders dated May 21, 1991).

[33] Independent of the *Sunshine* analysis, Respondent also claimed that the OTS's accounting expert does not qualify as an expert because he had not yet received the results of his CPA exam. The Director rejects this argument. The OTS's accountant, through the course of his employment with the OTS, had substantial accounting expertise in the area of loan classifications.

b. Admissibility of the 1989 Report of Examination and related documents

The 1989 Report of Examination, the examiners' workpapers and the District Appraiser's reviews reflect the facts relied on, and the conclusions drawn, by the examiners regarding the loan classification that Respondent has sought to put at issue. Respondent contends that the report is inadmissible because it is neither reliable nor fair, as it is allegedly based on hearsay. He also claims that he was denied the opportunity to cross-examine, impeach and rebut the information contained in the examination report, the underlying examiners' notes and the OTS District Appraiser's reviews.

The ALJ correctly rejected these arguments. While, as discussed in further detail below, Respondent has demonstrated that he is entitled to two additional offsets on the Pembroke loan based on the evidence in the record, he has not shown that the papers relating to the 1989 examination are inadmissible. First, the Federal Rules of Evidence do not apply in this proceeding. *See, e.g., Richardson v. Pearales*, 402 U.S. 389, 400 (1971) (hearsay may be admissible in administrative proceedings); *Hoska v. United States Dep't of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982) (hearsay, if relevant and material, is admissible in administrative proceedings); *Director, OTS v. Lopez*, 960 F.2d 958, 964 n.11 (1992) (it is well-settled that Federal Rules of Evidence do not apply in administrative proceedings). Accordingly, the Acting Director need not reach the issue of what materials would be admissible under the Federal Rules of Evidence. Under the procedural rules applicable to this action, only "[i]rrelevant, immaterial or un-

duly repetitious evidence shall be excluded." 12 C.F.R. § 509.24(a) (1990); *see also* 5 U.S.C. § 556 (d) (1988).[34]

Second, the Report of Examination, the examiner's workpapers and the District Appraiser's reviews do not fail under any of these standards. They reflect the agency's findings concerning the specific loan classifications at issue. Accordingly, their admission was not error. The ALJ correctly concluded that these materials were fair and reliable. As the ALJ found:

> A report of examination, such as OTS EX 33, is the fundamental tool through which federal regulatory agencies assess the safety and soundness of federally insured depository institutions. These agencies make supervisory decisions in reliance upon these examination reports which contain information gathered in accordance with established regulatory and supervisory practices.

Recommended Decision at 39. The workpapers and District Appraiser's reviews underlying the examination report are also fair and reliable. The Acting Director affirms the ALJ's conclusion that such documents are admissible in this proceeding.

Even if admissible, however, the question remains concerning the appropriate weight to be accorded these materials. Because these materials reflect the facts and conclusions summarized by the examiners, it appears appropriate to apply the *Sunshine* standard to determine the deference to be accorded the examiners' opinions. As discussed more specifically

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[34] Under the revised procedural rules, evidence need only be "relevant, material, reliable, and not unduly repetitive." 12 C.F.R. § 509.36(a) (3) (1993).

below, the Director finds generally that such documents reflect conclusions that are due deference under *Sunshine*.

Moreover, as noted by the ALJ, Respondent has had ample opportunity throughout the hearing process to challenge the accuracy of these documents. He has not, however, demonstrated that such documents are irrelevant, immaterial, repetitive unreliable or not credible. Accordingly, the ALJ properly admitted these documents into evidence.

c. Entitlement to Offsets

The Acting Director makes the following additional findings and conclusions with respect to Respondent's claim that he is entitled to offset the amount of his liability under the Net Worth Maintenance Agreement. As noted above, the ALJ did not permit any offset for either of the two disputed loans. The Acting Director rejects that conclusion and, as discussed below, will permit a $409,325 offset in connection with the Pembroke loan.

i. Pembroke Loan

(a). Loan Terms

In January, 1986, the Association granted a loan to Pembroke Development Corporation ("PDC") for the acquisition, development and construction of a 86,000 square foot self-storage facility in Delray Beach, Florida. As of September 30, 1989, the Association had a recorded investment of $3,305,607 in the loan. The loan was originally supported by an appraisal apparently prepared in October, 1985, which valued the property at $3,530,000.

The loan was secured by a guarantee of collection [35] executed by Albert Miller ("Miller"), the owner of PDC. Miller's personal financial statement reflected approximately $12.2 million in net worth; approximately $8.4 million of this amount constituted the value of his personal residences and his interest in PDC.

(b). History

As the 1989 Report of Examination notes, this loan had a troubled history since at least 1987. During the period May 1987-May 1988, one half of the payments were at least 30 days delinquent. Among other things, the leasing of the facilities was lower, and the rent obtained lower, than anticipated, which resulted in the property's failure to produce sufficient income to service the debt. The loan was subject to special mention in the May 9, 1988, Report of Examination, due to low borrower equity and an occupancy rate of approximately 35 percent. Based on the borrower's difficulties in repayment, the debt was restructured in the spring of 1989. As part of the restructuring Miller agreed to waive a potential lender liability claim against the institution. Nonetheless, the borrower failed to make any payments at least as of August 28, 1989. The Association commenced foreclosure proceedings on October 3, 1989. The OTS's 1989 examination began shortly thereafter.

In connection with the examination, on November 6, 1989, the OTS-Atlanta District Appraiser reviewed the Association's October, 1985 appraisal of the prop-

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[35] The guarantee of collection provided that the Association would have to first seek repayment from the PDC, then commence foreclosure proceedings on the collateral before seeking repayment from Miller.

erty and found it deficient in a number of respects. First, the appraisal—which had been prepared before the property had been developed—did not take into consideration current property values or actual income production. The District Appraiser criticized the appraisal because, among other things, it failed to include significant property estimates and a rationale supporting certain of the appraiser's conclusions. The District Appraiser also concluded that the appraisal in the Association's files was "an inappropriate tool for underwriting a loan because of the hypothetical value estimate that was reported in it."

To better ascertain fair value, the District Appraiser calculated a stabilized operating statement based on income for the property and expenses which were based on similar facilities. The District Appraiser concluded that the fair value of the property was $2,464,413, and recommended rejecting the earlier appraisal as deficient.

As a result of the examination, the OTS required that $841,194 be classified as a loss, which the institution did under protest on March 23, 1990. The Association apparently acquired the property on March 5, 1990, as a result of foreclosure and hired a property manager.

On April 3, 1990, a second appraisal was performed on the property, which concluded that the fair value of the property was approximately $3.15 million. Information supplied by the new property manager showed that since March 1990, the amount of rent received increased significantly, suggesting that "the borrower may have skimmed cash from the receipts." In an appraisal review dated May 21, 1990 (OTS Exhibit 37) the District Appraiser recommended that this information be brought to manage-

ment's attention so the institution might pursue legal proceedings against the borrower if appropriate.[36] The Appraiser concluded, in light of the increased income stream, that the April 3, 1990 appraisal was reasonable and that the estimated fair value was $2.95 million.

(c). Respondent's Exceptions

Respondent contends that the OTS's loss calculation of $841,194—based on a fair value of the loan at $2,464,413—is arbitrary and capricious since the District Appraiser's May 21, 1990 appraisal review concludes that, in light of the information discovered after the Association took possession of the property, a fair value of $2,950,000 was reasonable. Respondent also asserts that the OTS's original fair value calculation contained numerous significant omissions and miscalculations. Respondent argues further that the OTS loss classification misjudged the value of the litigation against Miller, the guarantor, as reflected by the fact that the Association ultimately recovered $100,000 from Miller (despite the OTS's assumption that the guaranty was of little value); and erred in concluding that the guarantor's financial statements were unreliable.

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[36] The record does not reflect, however, that the Association took action against the borrower in this regard. Rather, the record reflects only that the Association obtained a $100,000 settlement from Miller on his personal guaranty after the 1989 examination concluded. Nor does the record demonstrate that the Association made further inquiry to determine whether grounds existed for an independent action against the borrower.

(d). Analysis

Under generally accepted accounting principles ("GAAP"), property in foreclosure must be accounted for according to its fair value. See *Statement of Financial Accounting Standards ("SFAS") No. 15: Accounting by Debtors and Creditors for Troubled Debt Restructurings* (1977). In light of the pending foreclosure proceeding—which the Association had instituted even before the 1989 examination was commenced—the examiners determined that the Pembroke loan should be accounted for in accordance with SFAS 15. The proper application of SFAS 15 was confirmed by the OTS's accounting expert at the hearing.

Under SFAS 15, when an asset is in foreclosure its fair value must be calculated, based on the information available at the date of foreclosure, and compared with the recorded investment receivable. Accordingly, the ALJ properly found that the Association was required to recognized the $891,194 difference between the Association's recorded investment and the fair value as a loss.

Respondent contends, however, that he is entitled to offset against this amount by any subsequent alleged recovery by the institution, because Florida state law, rather than GAAP, dictates the recovery under the Net Worth Maintenance Agreement.

For regulatory and financial reporting purposes, information obtained subsequent to the close of the examination is not relevant for assessing the propriety of loan classifications. *See In re Anonymous*, Docket No. 84-100b (Prentice Hall FDIC Enforcement Decisions and Orders dated September 16,

1985).[37] Nor are the loan classifications directed against Great Life directly at issue here. Rather, these issues are relevant herein only to the extent they concern the appropriate measure of Respondent's liability under the Net Worth Maintenance Agreement.

Respondent argues that the April, 1990, appraisal and OTS's evaluation thereof demonstrate that the November 6, 1989, appraisal review was inaccurate because it was based on information which was subsequently rendered suspect. He argues that the fair value of the property must be increased to the amount of the later appraisal.

Among other things, section 8(b)(6) of the FDIA permits the OTS to issue a cease and desist order requiring an institution-affiliated party such as Respondent to correct or remedy his violation of a written agreement, including a requirement that he "make restitution or provide reimbursement, indemnification, or guarantee against loss" if he has been unjustly enriched by his violation or acted in reckless disregard of the law. 12 U.S.C. § 1818(b)(6). *See Watchel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993). The remedy assessed by the Director must bear a reasonable relation to Respondent's violation of the Agreement. *Akin*, OTS Decision and Order No. AP 90-4009 at p. 50. Here, the OTS's remedy must bear a reasonable relation to Respondent's refusal to infuse

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[37] Indeed, even if the loan classifications were properly reviewable in this proceeding, the record reflects that the loss classifications were properly made under GAAP. The record does not reflect that the District Appraiser could reasonably have been expected to obtain information concerning the revised income stream earlier. Indeed, he relied on information supplied by the Association, and the institution apparently was not even aware of the alleged "skimming."

capital into the Association as required by the Agreement.

The Acting Director concludes that the payment of funds due under the Agreement is the appropriate remedy. The Acting Director affirms the conclusions of the ALJ that the Association had a capital deficiency of $2,784,000 as of December 31, 1989. Independent of any offsets, Respondent would be liable for 69.9 per cent of this deficiency—as the ALJ calculated, an amount of $1,946,000.

Under the unique facts of this case, however, the Acting Director is persuaded that Respondent is entitled to two offsets. The loss caused to the Association in connection with the Pembroke loan is properly calculated based on a fair value of $2,950,000. The May 21, 1990 appraisal review prepared by the OTS District Appraiser (OTS Exhibit 37) acknowledges the fact that it was subsequently discovered, after the close of the examination and before the appointment of the receiver, that the fair value calculation should be increased. Thus, the Acting Director concludes that Respondent is entitled to an offset in the amount of $339,425—representing 69.9 per cent of $485,587—reflecting the OTS's subsequent judgment on the fair value of the Pembroke property.

The Acting Director also concludes that Respondent is entitled to an additional offset in the amount of $69,900—representing 69.9 percent of $100,000—reflecting the recovery received under the guarantee of collection against Miller. Enforcement has not successfully rebutted Respondent's claim that the Association received this recovery prior to the appointment of the receiver. Accordingly, the Director finds that Respondent is entitled to a total offset in the amount of $409,325.

ii. The Louisville Loan

(a). Loan Terms

On July 30, 1985, the Association entered into a participation loan, structured by GermaniaBank, FSB of Alton, Illinois, in connection with the development of a hotel in Clarksville, Indiana. The Association's interest was approximately $1.5 million, representing approximately a 12 per cent share in the $11 million loan. The loan was secured by the hotel property which had originally been appraised at approximately $10.3 million. The remaining interests were held by GermaniaBank (which, as lead lender, held a 60.15% interest) and Concord Liberty Savings and Loan Association of Monroeville, Pennsylvania.

(b). History

The loan had been in default since April, 1986. Another appraisal was performed by an appraiser for the institution in June 1989, at which time the property was revalued at approximately $4.8 million. The property was foreclosed on by, and came under the possession of, GermaniaBank in October, 1989.

The Association commenced litigation against GermaniaBank as the lead lender alleging, among other things, fraud and breach of fiduciary duty, and sought recovery of $2,500,000. GermaniaBank brought a counterclaim against the Association. The Association's counsel opined in July 1989 that "[a]lthough it is difficult to predict the outcome of pending litigation, it appears that Great Life Savings has a reasonable likelihood of success. . . ." [38]

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[38] Both suits were ultimately dismissed, however, after the RTC was later appointed receiver for both institutions. The Association never received any recovery from GermaniaBank.

As a result of the 1989 examination, the OTS concluded that the fair value of the Association's interest in the loan to be only $423,617, based on its review of the June 1989 appraisal which valued the hotel at approximately $4.8 million. The OTS District Appraiser determined that the appropriate fair value of the hotel was $3,367,388, after subtracting $750,000 for the cost of asbestos removal and the costs of holding and selling the hotel over a two year period. Accordingly, the Association's interest was devalued to $423,617, and the OTS required the Association to classify the difference—$963,605—as a loss. The Association did so under protest on March 23, 1990.

(c). Respondent's Exceptions

Respondent contends that the OTS should have accepted, at least, the $4.8 million appraisal instead of the fair value of $3,367,388. If so, the loss to the Association would have been a lesser amount, and Respondent would be entitled to an offset. Respondent challenges the OTS's valuation as arbitrary and capricious, alleging it was based on a desk review and hearsay. Respondent also challenges the examiners' accounting treatment of the Association's lawsuit against the lead lender, GermaniaBank.

(d). Analysis

After careful consideration of Respondent's arguments, the Acting Director affirms the findings and conclusions of the ALJ with regard to the Louisville loan. As discussed above, the Acting Director accords substantial deference to the reasonable conclusions reached by the examiners. *Sunshine*, 783 F.2d 1580 (11th Cir. 1986). First, since the property was an

asset in foreclosure, the examiners properly relied on SFAS 15 and the District Appraiser's review and calculation—the only fair value calculation in the record—which was also supported by the testimony of the OTS's appraisal expert. Second, Respondent has not shown that it was error for the examiners not to have given more weight to an opinion prepared by Price Waterhouse, the Association's outside auditors, upon which they theorize that under GAAP, the Association was entitled to defer any possible loss on the loan until the litigation with GermaniaBank was concluded. It was reasonable for the examiners to conclude that the opinion was not persuasive, because it indicated the difficulties on settling on a reserve amount in light of the litigation, and even notes that a conservative approach would be to calculate a reserve based on the lowest appraised value minus disposal costs. Moreover, given the fact that any recovery awarded could not have been realized for some period of time (a trial date was not scheduled until 1990 at the earliest), it was reasonable for the examiners to determine that the possible recovery was too attenuated in time to be accounted for presently as a gain contingency under GAAP.

The examiners' conclusion that the Association failed to support a fair value estimation of its interest in excess of $423,617 was thus reasonable in light of the record evidence and should be accorded deference. The Acting Director affirms the ALJ's determination that Respondent is not entitled to an offset in connection with the Louisville loan.

VI. CONCLUSION

Based on the record, the Acting Director finds that Respondent's execution of the Net Worth Maintenance Agreement rendered Respondent personally liable for a portion of the Association's net worth, if its net worth fell below required levels during the five year term of the Agreement; that Respondent violated the Net Worth Maintenance Agreement by failing to infuse capital into the Association when his obligation to do so under the Agreement was triggered; and that Respondent's failure to infuse capital as required under the Agreement unjustly enriched him. Accordingly, the Acting Director affirms the conclusions of the Administrative Law Judge below with respect to Respondent's liability.

The Acting Director reverses the conclusions of the Administrative Law Judge with respect to the amount of Respondent's liability in connection with offsets claimed in regard to the Pembroke loan, totalling $409,325. Accordingly, the Acting Director orders Respondent to pay $1,536,675 to the Association in receivership.

All other exceptions lodged by Respondent and not otherwise addressed are denied.

ORDER

Upon consideration of the entire record in this matter, including the Recommended Decision filed by the Administrative Law Judge, the submissions of the parties, and for the reasons set forth in the accompanying Decision, the Director of the OTS, pursuant to his authority under 12 U.S.C. § 1818(b), finds that:

Respondent Robert D. Rapaport ("Rapaport") has violated the Net Worth Maintenance Agreement he executed in connection with the FHLBB's grant of federal deposit insurance to Great Life Savings and Loan Association ("Great Life"); and Rapaport was unjustly enriched by his violation of the Net Worth Maintenance Agreement.

IT IS HEREBY ORDERED THAT:

1. Rapaport shall cease and desist from violating the Net Worth Maintenance Agreement;

2. On the effective date of this Order, Rapaport shall contribute capital, in the amount of $1,536,675, representing his liability under the Net Worth Maintenance Agreement, into Great Life, in a form acceptable to the Resolution Trust Corporation ("RTC") as receiver;

3. The form of any capital that Rapaport contributes to Great Life under this Order must first be approved by the RTC. If, for any reason, the RTC does not approve the form of capital contribution by Rapaport, such disapproval shall not relieve Rapaport of his obligation to infuse capital into Great Life pursuant to this Order; and

4. The provisions of this Order are effective upon the expiration of thirty (30) days after service of

this Decision and Order on Rapaport, and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been stayed, modified, terminated, or set aside by the Director or a reviewing court. Rapaport is hereby notified that he has the right to appeal this Decision and Order to the appropriate United States Court of Appeals within 30 days after service of such Decision and Order. 12 U.S.C. § 1818(h).

OFFICE OF THRIFT SUPERVISION

/s/ Jonathan L. Fiechter
JONATHAN L. FIECHTER
Acting Director

Date: Nov. 18, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of November, 1993, copies of the foregoing (1) Decision and Order and (2) Order were served as indicated below on the following:

By Hand Delivery

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/s/ Melba McCannon
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Office of Thrift Supervision

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Supreme Court, U.S.
FILED
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CLERK

No. 95-738

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION,

Petitioner,

v.

ROBERT D. RAPAPORT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision which enforces statutory limitations on the agency's ability to order payment of money, but which affects neither the agency's ability to seek damages in an Article III court, nor its ability to seek money in an administrative forum when it can show unjust enrichment, compromises or improperly limits the enforcement powers of federal banking agencies.

2. Whether there is a split in the circuits, when the Fifth Circuit found the defendant had received a significant personal benefit, but no corresponding benefit was present in this D.C. Circuit case, and when the D.C. Circuit found that fact alone could be sufficient to reconcile the two cases.

3. Whether the D.C. Circuit's handling of the issue of *Chevron* deference was inappropriate or even dispositive, when OTS is not the only agency entitled to administer and interpret the statute, when OTS' proposed "interpretation" was at odds with statutory language and Congressional intent, and when the court would have reached the same result under *Chevron* principles or under *de novo* review.

4. Whether it is appropriate for this Court to grant certiorari to consider a theory of recovery never advanced by OTS in the agency proceeding or in the D.C. Circuit, and never proposed by any banking agency in any other case, particularly where the new theory is no more than a play on words, totally at odds with principles of statutory construction, the agency's own interpretation of the statute, and common sense.

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No. 95-738

In The

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UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION,

Petitioner,

v.

ROBERT D. RAPAPORT

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Robert D. Rapaport, through his counsel, hereby opposes the Petition of the Solicitor General, filed on behalf of the Department of Treasury, Office of Thrift Supervision ("OTS"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

COUNTER-STATEMENT OF THE CASE

The Government's Statement of the Case is inaccurate in two

noteworthy respects. These inaccuracies are addressed *infra* at pp. 6-7, and p. 18, n. 10.

SUMMARY OF ARGUMENT

Until the filing of this Petition, the sole theory advanced by OTS to justify its recovery of money in an administrative (as distinguished from a judicial) proceeding was that Respondent failed to make a monetary payment under the terms of a net worth maintenance agreement and that such failure, by itself, constituted unjust enrichment within the meaning of 12 U.S.C. § 1818(b)(6)(A). The D.C. Circuit unanimously rejected the agency's theory and, in doing so, drew a distinct line between those circumstances in which a banking agency is authorized to seek a money recovery in administrative proceedings and those circumstances in which the agency must pursue its remedies in an Article III court. It correctly reasoned that § 1818(b)(6)(A) requires evidence of unjust enrichment — a personal benefit, something more than a failure to make a monetary payment under a contract — as a prerequisite to the recovery of money in an administrative proceeding.

In rejecting OTS' theory, the D.C. Circuit relied upon the fact that Respondent was only a shareholder of the institution, that he did nothing to cause its losses, that he received no personal benefit in any transaction with the institution, that he violated no law or regulation, and that the agency was free to pursue any alleged breach of contract remedy against Respondent in a judicial proceeding. In short, the D.C. Circuit viewed the agency's claim against Respondent as a straightforward contract dispute, not involving unjust enrichment, which should be decided by an Article III court and not on the agency's "home turf."

The Petition makes several imaginative but erroneous arguments in an effort to erase the statutory line between administrative and judicial disputes. It argues that the agency's interpretation of § 1818(b)(6) is reasonable and that the court should have deferred to the agency's reasonable interpretation of the term "unjustly enriched" as it is used in § 1818(b)(6)(A)(i). If the Government is correct, however, the term "unjustly enriched" as used in the statute will have no meaning whatsoever, since every dispute involving a failure to pay money would then be a candidate for an administrative resolution. This result flies in the face of the clear meaning of § 1818(b)(6), as well as the clear statements of Congressional intent. Equally important, there is not a single federal court ruling which would support the theory advanced by the agency.

Apparently recognizing the weakness of the agency's interpretation of § 1818(b)(6), the Government suggests a new theory to justify adjudicating monetary disputes in an administrative forum. It argues that OTS' § 1818(b)(1) "cease-and-desist" authority is sufficient to order affirmative relief so long as it phrases the order in a double negative. That is, instead of saying "I order you to pay money," which invokes the agency's affirmative action authority and implicates the statutory limits on that authority, the agency simply has to say "I order you to stop not paying money." Respondent submits that this new theory is simply a cynical play on words and, like the Government's "deference" theory, is just another way to erase the statutory line between cases appropriate for administrative proceedings and cases appropriate for judicial proceedings. Moreover, since this new theory has never been used before by OTS in this (or by any banking agency in any other) litigation, the final order issued by the OTS must stand or fall on the theory argued at the agency level and before the court of appeals. Counsel's *post hoc* rationalization for the agency's action must be rejected.

The Government also suggests that there is a split in the circuits, arguing that the Fifth Circuit has interpreted § 1818(b)(6) more broadly than did the D.C. Circuit below. However, the facts of the two cases are materially different. In the Fifth Circuit's decision, the respondent was in control of the institution and derived an immediate personal benefit from the agency's forbearance from pursuing a cease-and-desist action that threatened that control. In this case, the D.C. Circuit relied upon the fact that Respondent did not control the institution and did not receive any personal benefit. That factual difference, the court concluded, may be sufficient to reconcile the two cases.

Finally, the Government suggests that the D.C. Circuit's decision imposes "unjustified limits" on the ability of federal banking agencies to order the payment of money in administrative proceedings. If those limits are "unjustified," the banking agencies ought to seek relief in the halls of Congress where those "limits" were imposed in the first place. The D.C. Circuit did not create or invent the term "unjustly enriched." It merely held that the banking agency has not proven the factual prerequisite clearly specified in the statute and, therefore, the agency must seek relief, if at all, in a judicial, rather than administrative, forum.

REASONS FOR DENYING THE WRIT

I.

THE D.C. CIRCUIT'S DECISION DOES NOT SOUND THE DEATH KNELL FOR ENFORCEMENT OF NET WORTH MAINTENANCE AGREEMENTS.

The D.C. Circuit's decision does not spell the end of the banking agencies' ability to enforce net worth maintenance agreements *appropriately*. The decision does no more than

enforce the mandate of Congress that where, as here, a banking agency elects to enforce the agreement in an administrative action and seeks in that action to recover money for violation of the agreement, it must do so within the limitations Congress has placed on that particular remedy, by proving unjust enrichment or reckless disregard for law or regulation.

The decision does nothing to diminish the ability of a banking agency to sue for breach of contract in an Article III court if it believes the net worth maintenance agreement at issue is an enforceable contract.[1] *See In re Conner Corp.*, 127 B.R. 775 (E.D.N.C. 1991); *RTC v. Savers, Inc.*, 1990 U.S. Dist. LEXIS 10294 (E.D. Ark. June 12, 1990); *RTC v. Tetco, Inc.*, 758 F. Supp. 1159 (W.D. Tex. 1990), *vacated*, 1992 WL 437650 (5th Cir. 1992). Any civil suit for breach of contract naturally turns on its own facts. But even if the facts of this case are such that OTS would lose in a civil court, that does not give OTS the right to an administrative forum if it does not satisfy the statutory criteria. There is no federal policy that a banking agency must always win. *O'Melveny & Myers v. FDIC*, __ U.S. __, 129 L. Ed. 2d 67, 76 (1994).

The Government has lost sight of the fact that Congress never intended an administrative action to recover money to be the remedy of choice for the banking agencies. The Senate

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1. In its opinion, the D.C. Circuit stated that bank regulators could bring an action to enforce a net worth maintenance agreement in a U.S. District Court pursuant to 12 U.S.C. § 93. This is technically incorrect as applied to OTS but, assuming OTS is the proper successor to the agreement, OTS would have authority under the Home Owners' Loan Act, 12 U.S.C. § 1464(d)(1)(A), to sue for breach of contract in a district court. As an example, OTS' predecessor agency, the Federal Savings & Loan Insurance Corporation, filed a civil action for breach of contract on a net worth maintenance agreement, as a party to the agreement, citing its general "sue or be sued" authority, 12 U.S.C. § 1725 (1982). *FSLIC v. Mason*, Civil Action No. HM 88-3107 (U.S.D.C. Md.).

Committee Report which accompanied § 1818(b)(6) made this clear:

> It is the Committee's intent, however, that this power [to order affirmative relief] be used only in appropriate cases, for example, where the institution-related party has unjustly enriched himself at the institution's expense or . . . has acted in reckless disregard of the banking laws and regulations. It is not intended that this power will be used in cases where the institution-related party engaged in less serious violations.

S. Rep. No. 774, 101st Cong., 1st Sess. 39-40 (1989). OTS is entitled to an administrative forum, its "home court advantage," only when the statute permits. It is not entitled to convert every case seeking money damages for breach of contract into an administrative cease-and-desist proceeding.

Nor does the D.C. Circuit's decision compromise the ability of OTS to proceed in an administrative forum and collect money damages when it can prove unjust enrichment or reckless disregard for the law, as 12 U.S.C. § 1818(b)(6)(A) requires. The Government tries to give a false impression in its Petition that many cases will be compromised or lost if the D.C. Circuit's decision stands. Petition at p. 23. However, Respondent's counsel, who make an effort to stay abreast of net worth maintenance cases, are aware of only one other existing administrative net worth maintenance case.[2] In that case, which

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2. Respondent's counsel also know of one other net worth maintenance matter in which OTS recently gave the potential Respondent an "intent to sue" letter, saying that an administrative proceeding will be commenced during the month of December 1995. Obviously OTS is not deterred in that case by the D.C. Circuit's decision.

also seeks a monetary recovery, OTS has taken the position that it can go forward and prove its case in an administrative proceeding, despite the D.C. Circuit's decision.[3]

Indeed, as discussed *infra*, there is no reason to believe the D.C. Circuit's decision, had it then existed and been the applicable rule of law, would have prevented an OTS recovery in *Akin v. OTS*, 950 F.2d 1180 (5th Cir. 1992), the only contested net worth maintenance case OTS has won. The Fifth Circuit found a direct personal benefit to Mr. Akin in return for his agreement to maintain the institution's net worth, a benefit which Judge Ginsburg noted in *Rapaport* may have satisfied the statutory requirement of unjust enrichment ("Had Rapaport received the benefits of office as Akin did, he may well have been 'unjustly enriched,' at least to that extent, and that distinction may be enough to reconcile the two cases." *Rapaport*, Petitioner's Appendix ("Pet. App.") at 17a.

II.

THERE IS NO SPLIT AMONG THE CIRCUITS REQUIRING RESOLUTION BY THIS COURT.

The Government asserts as a reason for review by this Court that the holding of *Rapaport* is in conflict with the Fifth Circuit's decision in *Akin*. However, there is no conflict between *Rapaport* and *Akin* that is ripe for review at this time or which requires this Court's resolution.

Both cases required the reviewing circuit court to decide whether money damages could be recovered in an administrative proceeding for violation of a net worth maintenance agreement.

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3. Indeed, in this other pending net worth maintenance case, OTS has taken the position in its motion papers that the Administrative Law Judge is free to ignore *Rapaport*.

Both circuit courts correctly concluded that this implicated the affirmative action requirements of 12 U.S.C. § 1818(b)(6) and specifically the limitation in §1818(b)(6)(A) that OTS must prove unjust enrichment or reckless disregard of the law in order to obtain a money recovery. In *Akin*, unlike *Rapaport*, the court held that unjust enrichment had been proved. OTS has always claimed *Akin* so held on the ground that failure to "pay up" under the net worth maintenance agreement, in and of itself, constituted unjust enrichment, but the Fifth Circuit never said that. The Fifth Circuit mentioned Akin's failure to pay. However, it also mentioned Akin's status as President, Chairman, CEO and sole shareholder of the institution and the fact that Akin entered into his net worth maintenance agreement specifically to avoid the institution of cease-and-desist proceedings that would have threatened his continued control of the institution. These factors of institutional control and personal benefit are totally absent in *Rapaport* and, as Judge Ginsburg said, ". . . that distinction may be enough to reconcile the two cases." *Rapaport*, Pet. App. at 17a.

Are there areas of possible conflict between *Rapaport* and *Akin*? The cases potentially conflict, as Judge Ginsburg noted, on the measure of damages. *Id.* Damages in *Akin* were measured by the loss to the institution, whereas the correct measure of damages in an unjust enrichment case, Judge Ginsburg noted, is the benefit conferred on the defendant. However the issue of how damages should be measured was not discussed in any detail in *Akin*, and there is no indication that the correct measure of damages was an issue raised on appeal in that case. If there is any potential question about the correct measure of damages, it is one that needs to be further developed and articulated in the lower courts before it is ripe for resolution by this Court.

III.

THOUGH THE ISSUE WAS NOT CRITICAL TO THE OUTCOME OF THE CASE, THE D.C. CIRCUIT PROPERLY DECLINED TO DEFER TO OTS' "INTERPRETATION" OF UNAMBIGUOUS LANGUAGE IN A STATUTE ADMINISTERED BY SEVERAL AGENCIES IN ADDITION TO OTS.

The Government claims that, under the rule of *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the D.C. Circuit should have deferred to OTS' position, characterized by the agency as an "interpretation" of statutory language, that the unjust enrichment requirement of § 1818(b)(6)(A)(i) is met whenever money is allegedly owed, but not paid, under a net worth maintenance agreement. The majority of the D.C. Circuit panel correctly rejected OTS' argument that it must defer to agency "interpretation" of unambiguous language in a statute which several agencies (not just OTS) administer. Judge Rogers did not join in this part of the panel's decision, though she concurred in the result. However, the "deference" issue, if it is an issue at all, provides no basis for review of the D.C. Circuit's decision by this Court. Not only was the majority correct in its view that *Chevron* deference was not owed to OTS' "interpretation," but it is clear from both the majority and concurring opinions that the issue of "deference" was not critical to the outcome of the case.

Chevron does not require that a court defer to an agency "interpretation" of statutory language that is clear and unambiguous:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are

> contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

467 U.S. at 843, n. 9 (citations omitted). *See also In re Seidman*, 37 F.3d 911, 924 (3d Cir. 1994) ("interpretations contrary to the plain meaning of the statute are unacceptable" and not entitled to deference); *and see Rapaport*, Pet. App. at 20a (clear language of the statute and legislative history directly contradicts the agency interpretation for which it demands deference) (Judge Rogers concurring).

The D.C. Circuit majority found § 1818(b)(6)(A)(i) clear on its face, and it found that the statutory language and legislative history contradicted OTS' proposed "interpretation" of the term "unjust enrichment." The starting point for interpretation of any statute is not the agency's interpretation, but rather is the language of the statute itself. *Transohio Savings Bank v. OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992), quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Absent clearly expressed legislative intention to the contrary, the language of the statute must be regarded as conclusive. *Id.* In this case, the D.C. Circuit simply analyzed the plain language of the statute and concluded, quite properly, that the term "unjustly enriched" in § 1818(b)(6)(A)(i) should have its ordinary meaning at common law. *Rapaport*, Pet. App. at 11a. The court also looked to the legislative history of the statute to ascertain the Congressional intent behind the provision. It concluded that OTS' proposed "interpretation" of § 1818(b)(6)(A) would "eviscerate the clear Congressional intent" which obviously required "something more than failing to uphold one's end of a contract when it required that a party have been 'unjustly enriched' before he can be held personally liable in an

administrative proceeding." *Id.* at 16a-17a.[4] Even if deference to OTS' interpretation of § 1818(b)(6)(A) was an issue, the Court held, ". . . our analysis in *Wachtel* of the history of the statute and of the related case law would lead us to the same conclusion." *Id.* at 14a. In *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993), the court found that even if deference were otherwise proper, it "... would not defer to OTS' interpretation since the statutory language is not ambiguous and the agency's construction is capricious." *Id.* at 585.

The D.C. Circuit also declined to grant *Chevron* deference to OTS' "interpretation," because OTS shares responsibility for administering the statutory provisions of which § 1818(b)(6)(A)(i) is a part with the other banking agencies. Under such circumstances, Judge Ginsburg wrote, deferring to the interpretation of a single agency "... would lay the groundwork for a regulatory regime in which either the same statute is interpreted differently by the several agencies or the one agency that happens to reach the courthouse first is allowed to fix the meaning of the text for all." *Rapaport*, Pet. App. at 10a. The D.C. Circuit's holding that deference to a single agency's interpretation of a statute or regulation is not required where multiple agencies administer the statute or regulation is perfectly correct. *See Wachtel*, 982 F.2d at 585 (D.C. Cir. 1993); *1185 Ave. of Americas Assocs. v. RTC*, 22 F.3d 494, 497 (2d Cir. 1994) (declining to give full *Chevron* deference to the RTC's interpretation of 12 U.S.C. § 1821 (e) where several agencies administer the statute); *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) ("[W]here . . . Congress has entrusted more than one

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4. *See* the excerpt from FIRREA's legislative history quoted at p. 6, *supra*. If OTS was right that "unjust enrichment" was present any time a debt allegedly owed was unpaid, then every contract dispute over the payment of money would be a candidate for administrative adjudication, directly contrary to Congress' intent that the administrative remedy be reserved for the more serious cases.

federal agency with the administration of a statute . . . a reviewing court does not . . . owe as much deference as it might otherwise give if the interpretation were made by a single agency similarly entrusted with powers of interpretation").

Judge Rogers declined to join the panel majority on the issue of deference, but she was quick to point out in her concurring opinion[5] that the issue was not one which was critical to the court's essential holding or to the outcome of the case:

> The court has yet to decide the appropriate standard to review the OTS' construction of this provision of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") pertaining to cease and desist orders, and the court need not do so here. As in *Wachtel*, the result is the same whether the court applied *de novo* review or *Chevron* deference. The statutory language and the legislative history demonstrate that Congress did not intend that retention of money allegedly owed pursuant to a net worth maintenance agreement, by itself, would constitute "unjust enrichment" under § 1818(b)(6)(A)(i).

Rapaport, Pet. App. at 20a (footnote omitted).

There is no merit to the Government's contention that the D.C. Circuit's discussion of *Chevron* deference conflicts with

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5. The fact that Judge Rogers described her opinion as one "concurring in part and concurring in the judgment" is significant. Had she believed Judge Ginsburg's discussion of *Chevron* deference to be dispositive of the case, or otherwise central to the Court's judgment in favor of Rapaport, she would more properly have labeled her opinion, in whole or in part, as a "dissent."

decisions in other circuits. The outcome of the cases cited on this point in the Petition turned primarily on the language of the statute and congressional intent in enacting the legislation. None of the cases cited as conflicting with *Rapaport* ever mentioned or discussed the level of deference owed to an agency which shares responsibility for administering a statute with several other agencies.

In *In re Seidman*, 37 F.3d 911 (3d Cir. 1994), for example, a case the Government says conflicts with *Rapaport*, the Third Circuit described the standard of review in these words:

> In deciding legal issues, we must defer to an agency's consistent interpretation of the statute it administers unless it is "arbitrary and capricious," *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 844 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984). Nevertheless, when "bizarre" interpretations of a statute are made out of regulatory zeal," deference is not appropriate. *See Wachtel v. OTS*, 982 F.2d 581, 585 (D.C. Cir. 1993). Similarly, interpretations contrary to the plain meaning of the statute are unacceptable. *Elliott Coal Mining Co., Inc. v. Director, OWCP*, 17 F.3d 616, 629 (3d Cir. 1994).

Id. at 924. *Seidman* never addressed the issue of administration of a statute by more than one agency, and its articulation of the standard for according *Chevron* deference is precisely the standard applied in *Rapaport*. *See also Oberstar v. FDIC*, 987 F.2d 494, 501 (8th Cir. 1993) ("Though we must uphold any reasonable FDIC interpretation of the Control Act . . . we conclude that it does unacceptable violence to the plain language

of the statute for the agency to create narrow classes of 'exempt transactions' and then hold that all other transactions are automatically covered").

Nor does *Akin* conflict with *Rapaport* on this issue. The only discussion of *Chevron* deference in *Akin* appeared in the discussion of Akin's claim that OTS' cease-and-desist authority extended only to operating institutions and therefore ended when an institution was placed in receivership. On this issue, the Fifth Circuit held:

> *In the absence of clear congressional intent* to impose an automatic stay of cease and desist proceedings upon [the institution of] receivership, the Court should look only to "whether the agency's [action] is based on a permissible construction of the statute." [*citing Chevron*].

950 F.2d at 1185 (emphasis added). Although the agency ultimately prevailed in *Akin*, there is nothing in the Fifth Circuit's brief reference to *Chevron* that conflicts with the D.C. Circuit's position in *Rapaport*. The D.C. Circuit relied upon "clear congressional intent" to reject OTS' interpretation of the statute in both *Rapaport* and *Wachtel*.[6]

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6. *See Rapaport*, Pet. App. at 16a (expressing concern that OTS' interpretation of § 1818(b)(6)(A) would "eviscerate congressional intent"); *Wachtel*, 982 F.2d at 586 (attributing OTS' attempts to "circumvent the statutory language" to "excessive zeal").

Both of the other cases cited by the government as being in conflict with *Rapaport*, *Simpson v. OTS*, 29 F.3d 1418 (9th Cir. 1994), *cert. denied*, 130 L. Ed. 2d 1064 (1995) and *Rapp v. OTS*, 52 F.3d 1510 (10th Cir. 1995), referenced the silent and ambiguous nature of the statute in support of their

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The D.C. Circuit majority's decision not to defer to OTS' "interpretation" of the meaning of "unjust enrichment" was therefore perfectly justified and fully in accord with the principles of *Chevron*. Were there any question about this, however, such a question would provide no basis for review in this Court. As the concurring panel member was quick to point out, the issue of *Chevron* deference was not an essential part of the case and its resolution one way or the other would not have changed the outcome.

IV.

THE GOVERNMENT SEEKS CERTIORARI ON A GROUND NEVER PRESSED OR PASSED UPON BY THE COURT BELOW.

Recognizing, as it must, that the D.C. Circuit correctly interpreted the statutorily defined (and limited) conditions under which OTS can seek payment of money from a respondent in an administrative proceeding, the Government presents an entirely new theory to this Court, one which it never asserted in the underlying administrative proceeding and never raised on appeal in the D.C. Circuit. The Government now claims OTS could have ordered Respondent to pay money solely on the basis of the agency's "cease-and-desist" authority, 12 U.S.C. § 1818(b)(1), without resort to the agency's authority in 12 U.S.C. §§ 1818(b)(1) and (b)(6) to order "affirmative action to correct or

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(Cont'd)
decision to defer to OTS' interpretation of the phrases "reckless disregard" and "pattern of misconduct." Clearly, the court in *Rapaport* did not find the statute similarly silent or ambiguous, and these cases can be distinguished on this ground alone. In addition, it is interesting to note that the Court of Appeals in *Rapp* noted that Congress ". . . has entrusted the OTS with the responsibility for administering the statute." *Id.* at 1518. This court may not have even been aware that FIRREA is administered by more than one agency.

remedy" a condition resulting from the supposed violation. Even if this argument had merit — which it does not — the traditional rule of this Court precludes a grant of certiorari when the question presented was "not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927); *United States v. Williams*, 504 U.S. 36, 40 (1992). This new theory was not pressed or passed upon below. Indeed, Respondent believes it has never been pressed or passed upon in any case.

In its new theory, described at pp. 15-17 of its Petition, the Government says that 12 U.S.C § 1818(b)(1) grants two powers to OTS. They are the power to order an institution-affiliated party to "cease and desist" from engaging in violative conduct, and the power to order an institution-affiliated party to take "affirmative action" to correct conditions resulting from the claimed violation.[7] The Government then proceeds to contend, for the first time, that this case does not involve OTS' use of its "affirmative action" power. Therefore, the Government says, the case does not call into play the standards for affirmative action contained in § 1818(b)(6), most particularly the limitations of § 1818(b)(6)(A) requiring proof of unjust enrichment or reckless disregard for law for an order requiring the payment of money. The Government now contends, for the first time, that OTS' order to Rapaport to pay money can be upheld *solely* on the basis of the "cease-and-desist" authority of § 1818(b)(1), without any resort to the agency's authority to order "affirmative action." To reach this conclusion, the Government engages in some linguistic sleight of hand.

The Government now asserts that, if OTS believes Respondent breached a net worth maintenance agreement, it can obtain the relief it seeks (payment of money) in either of two

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7. 12 U.S.C. § 1818(b)(6) then goes on to describe and limit the types of affirmative action that can be ordered. *Wachtel*, 982 F.2d at 585.

ways. It can invoke its authority under §§ 1818(b)(1) and 1818(b)(6)(A), to direct Respondent to take "affirmative action." It does this by issuing an order that says, in effect, "I order you to pay $1.5 million." Since this is an order directing affirmative action — the payment of money — OTS must show unjust enrichment (or reckless disregard for law). Alternatively, so the new theory goes, OTS can rely solely on its cease-and-desist authority under § 1818(b)(1). If it elects to do that, it issues an order that says, in effect, "I order you to stop failing to pay $1.5 million." Though the result is the same — the payment of money — the Government says this alternative does not involve use of § 1818(b)(6)(A), so OTS has no need to prove unjust enrichment.

As is obvious, the Government's second alternative is simply a play on words, a classic example of the exaltation of form over substance. Since by definition a double negative ("stop failing to pay") equals a positive ("pay"), the Government thinks it has come up with a clever "end run" around the requirements and limitations of § 1818(b)(6). However the Government's new "double negative" theory is not only illogical, but it does violence to the clear language of the statute,[8] and to the fundamental rule of

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8. This tortured interpretation of 12 U.S.C. § 1818(b) is a litigation strategy for this case. It is not the construction of Section 1818(b) that OTS uses in the real world. For example, as recently as November 8, 1995, the very day the Government's Petition was filed in this Court, the Acting Director of OTS described in another case the interplay of the agency's "cease-and-desist" and "affirmative action" authority:

> The authority to issue a cease and desist order includes the authority to *place limitations on the activities or functions* of an insured depository institution or an institution-affiliated party .... Additionally, *if statutory predicates are satisfied*, the agency may require a party to *take affirmative actions* to correct or

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statutory construction that states that a Court should avoid interpretations which render other portions of a statute meaningless.[9]

Quite apart from (or perhaps because of) the facial absurdity of its "double negative" argument, OTS has never raised the argument during any aspect of the underlying administrative or appellate proceedings in this case,[10] and has never sought to predicate Mr. Rapaport's liability on this strained reading of

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> remedy any conditions resulting from any violation or practice with respect to which such order is issued. 12 U.S.C. § 1818(b)(1) and (6).

In re Seidman, OTS Order No. AP95-35 (Nov. 8, 1995) (emphasis added). The Acting Director said nothing about a "double negative" alternative that would allow the agency to avoid the requirements for ordering affirmative action.

9. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." Sutherland Stat. Constr. § 46.06 (5th Ed. 1992).

10. The Government tries to give the impression in its Statement of the Case that the Acting Director relied solely on § 1818(b)(1) and that the D.C. Circuit overruled him on this issue. Petition at 6. In fact, though the Acting Director cited to § 1818(b)(1) as his authority to issue a cease-and-desist order, he then went on to discuss his authority to take action to remedy any condition caused by a violation. *On the issue of remedy*, he cited to § 1818(b)(1) *and* (6) (specifically recognizing the preconditions of § 1818(b)(6)(A)), with a *"see also"* citation to *Wachtel* and *Akin*. Pet. App. at 53a. Both the Acting Director and the D.C. Circuit correctly framed the issue in this case as one of OTS compliance with the requirement that it prove unjust enrichment before it could order the payment of money. Only in the Petition does the Government claim, for the first time, that the issue is anything else.

§ 1818(b)(1).[11] As noted above, this Court will not grant certiorari when the question presented was not pressed or passed upon below. Also, this Court has made it clear on numerous occasions that "courts may not accept appellate counsel's post hoc rationalizations for agency action." *Motor Vehicle Manufacturers Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).

OTS' Enforcement Review Committee never relied upon the "double negative" argument or any "independent" cease-and-desist authority to issue the Notice of Charges in this case. Rather, the agency alleged:

> By violating the Agreement and/or condition imposed in writing *Rapaport has been unjustly enriched as that phrase is used in Section 8(b)(6) of the FDIA* as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(6)).

Notice of Charges, ERC Resolution No. 90-49 at 6, ¶ 26 (July 2, 1990), Resp. App. at 6a (emphasis added). Nor did the Administrative Law Judge rely on this theory in issuing his Recommended Decision:

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11. OTS also never raised the "double negative" argument in the *Wachtel* or *Akin* cases, the only other circuit court cases involving administrative enforcement of net worth maintenance obligations, or in any other case of which Respondent is aware. In fact, in another administrative net worth maintenance case which OTS has been litigating for well over a year, and which is now before the Administrative Law Judge on cross-motions for summary disposition, OTS has just moved to amend its Notice of Charges and its motion for summary disposition to assert the new "double negative" argument. These papers, which are reproduced in Respondent's Appendix ("Resp. App.") at 8a and 14a, make it abundantly clear that OTS regards this as a brand new theory.

> OTS is not suing in Court on the contract but has commenced this administrative proceeding under the terms of the thrift statute. Clearly Mr. Rapaport does have capital which under the NWMA he was requested to infuse into Great Life but did not and thus he should not retain it but should deliver it to OTS *since he has thereby been unjustly enriched.*

Recommended Decision and Order at 52 (emphasis added). *See also Id.* at 55 (finding that Mr. Rapaport "was unjustly enriched as that phrase is used in section 8(b)(6) of the FDIA as amended by the FIRREA, 12 U.S.C. § 1818(b)(6)").

The OTS Acting Director too found "that Respondent has been unjustly enriched by his violation of the Net Worth Maintenance Agreement" (*citing Akin*). Acting Director's Decision, Pet. App. at 65a. In his conclusions of law, the Acting Director relied on § 1818(b)(6), not on any "free-floating" cease-and-desist authority under § 1818(b)(1), to support his finding that payment of money by Mr. Rapaport would be the appropriate remedy:

> Among other things, section 8(b)(6) of the FDIA [Section 1818(b)(6)] permits the OTS to issue a cease and desist order requiring an institution-affiliated party such as Respondent to correct or remedy his violation of a written agreement, including a requirement that he "make restitution or provide reimbursement, indemnification, or guarantee against loss" if he has been unjustly enriched by his violation . . .

Acting Director's Decision, Pet. App. at 78a.

Nor did OTS try to raise this new argument before the D.C. Circuit. There, instead, it relied on its reading of *Akin* and its "interpretation" of the language of § 1818(b)(6)(A)(i), arguing that "unjust enrichment" occurs whenever money is owed but not paid. OTS never tried to characterize or justify the agency's order that Respondent pay $1.5 million as an exercise of its "cease-and-desist" power disembodied from an exercise of its "affirmative action" power. It never tried to justify affirmative action by the linguistic trick of a double negative.

The Government tries to excuse the failure to raise this argument below on the D.C. Circuit's decision in *Wachtel*, saying that case had already resolved the issue against it, so it would have been futile to raise the issue before the same court in *Rapaport*. Petition at 17. Had the D.C. Circuit actually been presented with the new "double negative" theory in *Wachtel*, it might have added it to the list of OTS arguments it found in that case to be "barely intelligible" or "frivolous." *Wachtel*, 982 F.2d at 585. As it happened, however, the argument was never made. Instead, OTS argued that since § 1818(b)(1) authorized *affirmative action*, the agency could order affirmative action on authority of § 1818(b)(1) alone and did not have to meet the requirements for affirmative action set forth in § 1818(b)(6). The D.C. Circuit said in rejecting this argument:

> . . . the government contends, in accordance with OTS' order, that the term "affirmative action" in § 1818(b)(1) is not limited at all by what might be thought to be a definition of affirmative action in § 1818(b)(6). We should think of the term used in § 1818(b)(1), instead, as more free floating, not necessarily bound to Congress' elaboration of the phrase in § 1818(b)(6); as far as we can tell, for that matter, not particularly bound to any linguistic restraint in the statute.

* * *

> It seems to us almost frivolous to claim that the agency's authority to require affirmative action in § 1818(b)(1) is not limited by the later section, § 1818(b)(6), in which Congress sets forth what it means by "affirmative action."

Wachtel, 982 F.2d at 585.[12] What the D.C. Circuit rejected (as "almost frivolous") in *Wachtel*, therefore, was the argument that § 1818(b)(1)'s *affirmative action authority* could somehow be divorced from the requirements for affirmative action set forth in § 1818(b)(6).[13] Having lost that argument, the Government now

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12. *See also* Brief of Respondent Office of Thrift Supervision in *Wachtel* at 47 ("12 U.S.C. §1818(b)(1) . . . authorizes the director to order a respondent to take *affirmative action* to correct conditions resulting from any violation of a condition imposed in writing. Acting pursuant to this provision, which does not require any finding of unjust enrichment or reckless disregard for the law, the Director ordered that Petitioners correct the capital deficiency") (emphasis added); *and see* Oral Argument of Dirk Roberts, Counsel for the Office of Thrift Supervision, on November 3, 1992 before the D.C. Circuit at 30 ("You get around [the requirements of unjust enrichment and reckless disregard] because (b)(1), the general provision in (b)(1), which (b)(6) amplifies and does not restrict, does not require those findings; (b)(1) authorizes the Director to order affirmative action to correct conditions resulting from a violation.").

13. The Government cites *United States v. Williams*, and cases which precede it, as authority for its position that this Court should review its "double negative" theory as articulated in *Wachtel*, even though the issue was not raised in *Rapaport*. The Government's reliance on *Williams*, however, is misplaced. In that case, this Court held that:

> It is a permissible exercise of our discretion to undertake review of an important issue *expressly decided* by a federal court where, although the

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advances the proposition that § 1818(b)(1)'s *cease-and-desist authority* can be similarly divorced and can provide stand-alone justification for what is clearly "affirmative action." The new argument has no more merit than the old, but it is a decidedly different argument.

Even if the Government's new theory had merit — which it does not — in light of the fact that this issue was never pressed, nor passed upon by the Court below, the question of justification of the order in this case solely on § 1818(b)(1)'s basic "cease-and-desist" authority is not properly presented in the Petition and does not provide any basis for grant of a writ of certiorari.

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> petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede the correctness of that precedent.

504 U.S. at 44-45 (footnote omitted; emphasis added). Whether or not OTS conceded the correctness of *Wachtel* (having sought neither reargument nor certiorari in the case), OTS' new theory was not even presented to, much less *expressly decided* by the D.C. Circuit in *Rapaport* or *Wachtel*.

CONCLUSION

The language of 12 U.S.C. §§ 1818(b)(1) and 1818(b)(6) expresses the clear intent of Congress, an intent recognized by the courts in *Akin*, *Wachtel* and *Rapaport*, that OTS can recover money in an administrative proceeding only when it can prove unjust enrichment or reckless disregard for law. OTS cannot show unjust enrichment in this case, because Respondent reaped no personal benefit. If OTS has a remedy against Respondent, that remedy lies in an Article III court, not in an administrative forum. To hold otherwise would be to give OTS an unfettered power to engage in administrative enforcement, and that is a power Congress never intended it to have. There is no basis on which to conclude the D.C. Circuit's decision is incorrect, and there is no reason for this Court to review that decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A — THE OFFICE OF THRIFT SUPERVISION'S NOTICE OF CHARGES ISSUED AGAINST MR. RAPAPORT ON JULY 2, 1990

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Enforcement Review
Committee Resolution
No. 90-49
dated July 2, 1990

In the Matter of

ROBERT D. RAPAPORT

Majority Shareholder of Great Life Savings Association, Sunrise, Florida

NOTICE OF CHARGES AND HEARING

In accordance with Section 5(d)(1)(A) of the Home Owners' Loan Act of 1933 ("HOLA"), as amended by Title III of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ("FIRREA") (to be codified at 12 U.S.C. § 1464(d)(1)(A)), and Section 8(b) of the Federal Deposit Insurance Act ("FDIA"), as amended by Title IX of the FIRREA (to be codified at 12 U.S.C. § 1818(b)), the Office of Thrift Supervision ("OTS"), being of the opinion that Robert D. Rapaport has violated the net worth maintenance agreement between him and the Federal Savings and Loan Insurance Corporation ("FSLIC") by failing to maintain the net worth of Great Life Savings Association, Sunrise, Florida ("Great

Life"), as required by such agreement, hereby issues this Notice of Charges and Hearing ("Notice of Charges") against Robert D. Rapaport.

I. JURISDICTION

1. Robert D. Rapaport ("Rapaport) own approximately 233,111 shares of Great Life's total outstanding shares of stock or approximately 70 percent of Great Life's outstanding shares. Rapaport resides in Palm Beach County, Florida.

2. Great Life is a state-chartered stock institution, which is located in Sunrise, Florida. In March 1985, Great Life was chartered and received its insurance of accounts from the FSLIC. Great Life does not currently operate any branch offices.

3. Great Life is a "savings association" as defined by Section 2(4) of the HOLA, as amended by Section 301 of the FIRREA (to be codified at 12 U.S.C. § 1462(4))5 Section 3(b) of the FDIA as amended by Section 204(b) of the FIRREA (to be codified at 12 U.S.C. § 1813(b)); and Section 4 of the FDIA, as amended by Section 205 of the FIRREA (to be codified at 12 U.S.C. § 1814).

4. The Director of the OTS is the "appropriate Federal banking agency" as defined in Section 3(q) of the FDIA, as amended by Section 204 of the FIRREA (to be codified at 12 U.S.C. § 1813(q)).

5. The Director of the OTS has the authority to bring this administrative cease and desist proceeding pursuant to Section 5(d)(1)(A) of the HOLA, as amended by Title III of the

FIRREA (to be codified at 12 U.S.C. § 1464(d)(1)(A)), and Section 8(b) of the FDIA, as amended by Title IX of the FIRREA (to be codified at 12 U.S.C. § 1818(b)).

6. Rapaport acquired control of Great Life in 1985. Rapaport was a controlling shareholder of Great Life during all relevant times herein. Therefore, he is an "institution-affiliated party" as defined in Section 3(u) of the FDIA, as amended by Section 204(f)(6) of the FIRREA (to be codified at 12 U.S.C. § 1813(u)).

7. The OTS may enforce written agreements entered into with the FSLIC or the Federal Home Loan Bank Board ("FHLBB"), or conditions imposed in writing by the FSLIC or FHLBB, pursuant to Section 3(e) of the HOLA, as amended by Title III of the FIRREA (to be codified at 12 U.S.C. § 1462a(e)), and Sections 401(f), 401(g), and 401(h) of the FIRREA.

8. Rapaport is subject to the authority of OTS to bring this administrative cease and desist proceeding against him pursuant to section 8(b) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)).

II. FACTS

9. On March 19, 1985, Rapaport entered into a Net Worth Maintenance Agreement ("Agreement") with the FSLIC, pursuant to a condition imposed in writing by the FHLBB as operating head of the FSLIC in connection with its approval of Rapaport's acquisition of approximately 70 percent of Great Life's outstanding stock and a de novo application for insurance of accounts. The Agreement is attached hereto as Exhibit 1 and made a part of this Notice of Charges.

Appendix A

10. FHLBB Resolution No. 85-156 ("Resolution") approved Rapaport's acquisition of control and the application for insurance of accounts subject to the condition, among other things, that Rapaport agree to maintain the net worth of Great Life at certain levels. The Resolution is attached hereto as Exhibit 2 and made a part of this Notice of Charges.

11. Under the conditions of approval in the Resolution and the terms of the Agreement, Rapaport agreed to maintain his pro-rata share of Great Life's minimum net worth as required by 12 C.F.R. § 563.13 and any successor regulation thereto and to infuse sufficient additional capital to effect compliance with his pro-rata share of such requirement.

12. Section VIII(D) of the Agreement provided that with respect to successor regulations, subsequent amendments of regulations then in effect "may increase or decrease" Rapaport's obligations under the Agreement.

13. The terms of the Agreement defined a "default" under Section II as the failure of Rapaport to maintain Great Life's net worth in compliance with the Net Worth Requirement under 12 C.F.R. § 563.13 or any successor regulation.

14. Section V(A)(1) of the Agreement provided that in the case of a default, Rapaport shall infuse additional capital in a form satisfactory to the Supervisory Agent in an amount equal to the amount of any net worth deficiency multiplied by the percentage of his stock ownership of Great Life.

15. Great Life failed to meet its regulatory capital requirement as of September 30, 1989 by at least $152,000.

16. On November 14, 1989, the OTS Atlanta District provided written notice to Rapaport of Great Life's failure to meet it capital requirement as of September 30, 1989, and requested that he infuse additional capital in the amount of $106,248 into Great Life in accordance with the terms of the Agreement.

17. By letter dated November 30, 1989, Rapaport stated that he was unable to infuse additional capital into Great Life according to the terms of the Agreement.

18. A notice of failure to correct the net worth deficiency of Great Life within 60 days pursuant to Section V of the Agreement was given by the OTS Atlanta District to Rapaport by letter dated January 16, 1990.

19. Great Life failed to meet its regulatory capital requirement by approximately $980,000 as of December 1, 1989.

20. Under the new capital standards of the FIRREA, Section 5(t) of the HOLA, as amended by Title III of the FIRREA (to be codified at 12 U.S.C. § 1464(t)), and regulations promulgated thereunder, 12 C.F.R. pt. 567 (1990), which succeeds 12 C.F.R. § 563.13, the net worth deficiency of Great Life as of December 31, 1989, was approximately $1.7 million for tangible capital, $2.4 million for core capital and $3.2 million for risk-based capital.

21. From approximately September 30, 1989, through the date of the issuance of this Notice of Charges, Rapaport has failed to maintain the net worth of Great Life in accordance with the Agreement.

Appendix A

III. CHARGES

22. Paragraphs 1 through 22 are realleged and incorporated herein by reference.

23. The Agreement is a "written agreement entered into with the agency," as that phrase is used in Section 8(b)(1) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(1)), and a "written agreement entered into with the Corporation," as that phrase was used in Section 409(e) of the National Housing Act, as amended ("NHA"), 12 U.S.C. § 1730(e)(1982).

24. The condition contained in the Resolution that Rapaport agree to maintain his pro-rata share of Great Life's minimum net worth is a "condition imposed in writing" as that phrase is used in Section 8(b)(1) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(1)), and was used in Section 407(e) of the NHA, 12 U.S.C. § 1730(e) (1982).

25. Rapaport violated the Agreement and the condition imposed in writing as of approximately September 30, 1989, and has continued to violate such Agreement and condition imposed in writing as of the date of this Notice of Charges by failing to cause the net worth of Great Life to be maintained at a level required by such Agreement and/or 12 C.F.R. § 563.13 or successor regulation, and by failing to infuse sufficient additional capital as required by such Agreement.

26. By violating the Agreement and/or condition imposed in writing Rapaport has been unjustly enriched as that phrase is used in Section 8(b)(6) of the FDIA as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)(6)).

Appendix A

IV. NOTICE OF HEARING

Notice is hereby given that an administrative hearing will be held pursuant to Section 8(b) of the FDIA, as amended by the FIRREA (to be codified at 12 U.S.C. § 1818(b)), and in accordance with the Rules of Practice and Procedure of the Office of Thrift Supervision, 12 C.F.R. pt. 509 (1990) ("Procedural Rules"), to determine whether an Order to Cease and Desist should issue against Robert D. Rapaport for violation of the Agreement and condition imposed in writing. The hearing is hereby fixed for sixty days after service of this Notice of Charges in Ft. Lauderdale, Florida before a presiding officer to be designated by the Office of Thrift Supervision, subject to change by order of the presiding officer or the OTS.

Rapaport is directed to file an Answer to the allegations contained herein within twenty (20) days from the date of service hereof, as provided by Section 509.14 of the Procedural Rules. The requirements of the Answer, as well as the consequences of failure to file an Answer, are set forth in Section 509.14 of the Procedural Rules. Rapaport is also directed to have his respective representative, if any, file a Notice of Appearance as set forth in Section 509.5 of the Procedural Rules.

By the Enforcement Review
Committee

s/ Rosemary Stewart
Rosemary Stewart
Secretary, Enforcement
Review Committee
Director of Enforcement

APPENDIX B — THE OFFICE OF THRIFT SUPERVISION'S SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION *IN RE CITYFED FINANCIAL CORP., ET AL.*

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Re: OTS Order No. AP 94-26

Dated: June 2, 1994

In the matter of

CITYFED FINANCIAL CORPORATION, Nantucket, Massachusetts,

a Savings and Loan Holding Company, and

GORDON E. ALLEN
JOHN W. ATHERTON, JR.
EDWIN M. HALKYARD
ALFRED J. HEDDEN
PETER R. KELLOGG
WILLIAM A. LIFFERS and
GILBERT G. ROESSNER

Former Directors of CITY FEDERAL SAVINGS BANK Bedminster, New Jersey.

Appendix B

SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF OTS'S MOTION FOR PARTIAL SUMMARY DISPOSITION

Enforcement hereby supplements its pending Motion for Partial Summary Disposition of its cease and desist claim against respondent CityFed Financial Corp. ("CityFed"). Enforcement initially moved for partial summary disposition in August, 1994 and supplemented that motion in September and October, 1995.

BACKGROUND

The second round of summary disposition motions in this case was the result of the July, 1995 ruling of the United States Court of Appeals for the District of Columbia in *Rapaport v. OTS*, 59 F.3d 212 (D.C. Cir. 1995). On November 8, 1995, the Solicitor General, on behalf of OTS, filed a Petition for a Writ of Certiorari with the United States Supreme Court in *Rapaport. See* 64 U.S.L.W. 3359 (U.S. Nov. 14, 1995) (No. 95-738).

In that petition, the Solicitor General argues, *inter alia*, that the Director's order at issue in the *Rapaport* case was within OTS's authority to order a party to cease and desist from violating a written net worth maintenance agreement under 12 U.S.C.A. § 1818(b)(1). *See* Petition for Writ of Certiorari, *Rapaport v. OTS*, at 15-17. Although the original Notice of Charges in this case invoked OTS's cease and desist authority under § 1818(b), OTS has amended its pleadings to more explicitly highlight the § 1818(b)(1) grounds for relief. In order to present that argument to the Administrative Law

Judge as part of his consideration of OTS's entitlement to summary disposition,[1] Enforcement hereby supplements its Memorandum in Support of Motion for Partial Disposition to articulate OTS's basic authority under § 1818(b)(1).

ARGUMENT

1. OTS is Entitled to a Cease and Desist Order Requiring CityFed to Honor its Net Worth Maintenance Agreement Under 12 U.S.C.A. § 1818(b)(1).

Section 1818(b)(1) provides OTS with the general authority to issue orders requiring that institution-affiliated parties, including savings and loan holding companies (see 12 U.S.C.A. § 1818(b)(9)), cease and desist from engaging in an unsafe or unsound practice, violating a condition imposed in writing by the agency in connection with the granting of any application, or violating any written agreement with the agency. Here, CityFed entered into a written agreement with the FHLBB, as a condition of the FHLBB's granting of CityFed's application to acquire and receive stock dividends from City Federal, and then violated that agreement.

Under § 1818(b)(1), the Director has the authority to order CityFed to cease and desist from that violation. Because the agreement in question was one to pay money under certain

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1. In a November 27, 1995 letter to the Administrative Law Judge, Mr. Eisenhart tates that he will oppose the § 1818(b)(1) argument raised by the Solicitor General in the *Rapaport cert.* petition in part because that argument had not been raised by OTS earlier in that case. Supplementation of the Notice of Charges and summary disposition papers in this case will allow the § 1818(b)(1) claim to be presented at the earliest possible stage in the administrative proceedings, prior to any rulings on dispositive motions.

circumstances, which have transpired, the cease and desist order requiring performance of that agreement would effectively require the payment of money. *Cf., Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988) (distinguishing specific relief requiring payment of money from "money damages").

The validity of such an order does not depend on OTS's authority to order "affirmative action" under the last sentence of § 1818(b)(1), or under § 1818(b)(6). Those provisions merely supplement OTS's basic authority under § 1818(b)(1) to order CityFed to cease and desist from violating its written net worth maintenance agreement with the agency. Section 1818(b)(1) further provides that any such order may require a party to cease and desist from its violation by provisions which may be mandatory or otherwise." That basic authority, which flows directly and solely from § 1818(b)(1), is sufficient authority for issuance of a cease and desist order requiring CityFed to honor the net worth maintenance agreement.

Such an order is not precluded by the decision in *Wachtel v. OTS*, 982 F.2d 581 (D.C. Cir. 1993). The D.C. Circuit's sweeping declaration in *Wachtel* that an order to comply with a net worth maintenance agreement could only be entered under § 1818(b)(6) was based on a construction of the interrelationship between the affirmative action phrase contained in the last sentence of § 1818(b)(1) and the enumeration of affirmative action remedies in §1818(b)(6). The court in *Wachtel* did not properly consider the authority available to the Director of OTS in the basic cease and desist powers of § 1818(b)(1) to compel compliance with a written net worth maintenance agreement and by mandatory

provisions require the performance of that agreement by ordering the payment of money. Clarifying and preserving that argument at this stage of this proceeding squarely presents the issue prior to any decision on the merits.[2]

There is no dispute on the record in this case that CityFed has violated its written net worth maintenance agreement with the FHLBB. In fact, it has admitted as much in its Answer. *See* CityFed's Amended Answer at ¶¶ 23, 25. That is the only material issue involved in a determination whether an order under § 1818(b)(1) to cease and desist is appropriate. Accordingly, OTS is entitled as a matter of law to an order requiring CityFed to cease and desist from violating the net worth maintenance agreement and pay what is due under that agreement.

CONCLUSION

Based on the foregoing, there is no dispute that CityFed has violated its net worth maintenance agreement and OTS is entitled as a matter of law to an order requiring CityFed to cease and desist from violating the net worth maintenance agreement and requiring compliance therewith.

Dated: November 30, 1995 Respectfully submitted,

RICHARD C. STEARNS
Deputy Chief Counsel

---

2. In any event, if the holding in *Wachtel* is deemed to preclude every order to cease and desist that will ultimately result in the payment of money, OTS has not acquiesced in that ruling.

Appendix B

s/ Richard R. Riese
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APPENDIX C — THE OFFICE OF THRIFT SUPERVISION'S MOTION TO AMEND THE NOTICE OF CHARGES ISSUED IN *IN RE CITYFED FINANCIAL CORP., ET AL.*

UNITED STATES OF AMERICA
Before The
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

Re: OTS Order No. AP 94-26

Dated: June 2, 1994

In the matter of

CITYFED FINANCIAL CORPORATION, Nantucket, Massachusetts,

a Savings and Loan Holding Company, and

GORDON E. ALLEN
JOHN W. ATHERTON, JR.
EDWIN M. HALKYARD
ALFRED J. HEDDEN
PETER R. KELLOGG
WILLIAM A. LIFFERS and
GILBERT G. ROESSNER

Former Directors of CITY FEDERAL SAVINGS BANK Bedminster, New Jersey.

Appendix C

MOTION FOR LEAVE TO FILE AMENDED NOTICE OF CHARGES AND TO SUPPLEMENT MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DISPOSITION

Pursuant to Rule 509.20(a) of the Office of ThriftSupervision's ("OTS's") Rules of Practice and Procedure, 12 C.F.R. §§ 509, *et seq.*, Enforcement hereby moves for leave amend the Notice of Charges and Hearing for Cease and Desist Order to Direct Restitution and Other Appropriate Relief and Notice of Assessment of Civil Money Penalties ("Notice of Charges") issued by OTS in this case on June 2, 1994. An Amended Notice of Charges ("Amended Notice") has been issued by the Acting Director, OTS Order No. AP 95-___ (November 30, 1995), and is attached. Enforcement further moves for leave to supplement its Memorandum in Support of Motion for Partial Summary Disposition, originally filed August 1, 1994 and supplemented September 1, 1995. A Second Supplemental Memorandum is also attached.

ARGUMENT

Rule 509.20(a) provides that a Notice of Charges may be amended at any stage of the proceeding by leave of the administrative law judge. That Rule further states that such leave "will be freely given."

The Director, of course, has at all times the authority to issue and amend Notices of Charges. Here, the Acting Director has executed an Amended Notice that substantively changes

only two paragraphs of the original Notice,[1] and thereby clarifies the full breadth of agency remedial authority available for enforcing the net worth maintenance agreement at issue in this case. Those amendments should therefore be treated as an augmentation of the existing proceeding and a supplementation of the present record before the Administrative Law Judge on summary disposition.

CityFed and the individual Respondents will not be prejudiced by the amendments. The amendments do not involve additional factual allegations. Rather, Enforcement seeks leave to amend its file the Amended Notice [sic] and supplement its summary disposition papers simply to clarify and more fully develop a ground for recovery that is also part of OTS's petition for certiorari before the United States Supreme Court in *Rapaport v. OTS*, 59 F.3d 212 (D.C. Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3359 (U.S. Nov. 14, 1995) (No. 95-738).

Specifically, OTS has amended its filings in this case in order to clarify, as stated in paragraph 13 of the Notice of Charges, that the Director is authorized to issue a cease and desist order against CityFed and the individual Respondents pursuant to 12 U.S.C.A. § 1818(b). As such, pursuant to § 1818(b)(1), the Director has the authority to order CityFed and the individual Respondents to cease and desist from engaging in unsafe or unsound practices and/or from violating their written agreement with, and a condition imposed in writing by, the Federal Home Loan Bank Board ("FHLBB"), OTS's predecessor.

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1. The amendments appear at paragraphs 39 and 40 of the Notice of Charges. Enforcement has also updated the names of certain OTS personnel in paragraphs 59-60 and 62.

Appendix C

The amendment makes clear that OTS has not conceded here, any more than it did in *Rapaport*, the limit on its basic cease and desist authority suggested by the D.C. Circuit's earlier opinion in *Wachtel v. OTS*, 982 F.2d 581, 586 (D.C. Cir. 1993).[2] In this case, as in *Rapaport*, an order requiring CityFed and the individual Respondents to cease and desist from violating the written agreement with, and the condition imposed in writing by, their federal regulator would necessarily require payment of CityFed's net worth maintenance agreement. As such, a showing that CityFed has engaged in unsafe or unsound practices or violated its written net worth maintenance obligation is sufficient to meet the standards of § 1818(b)(1) for an order requiring CityFed, "by provisions which may be mandatory or otherwise" (*see* 12 U.S.C.A. § 1818(b)(1)), to cease and desist from its violation and perform its duties.

CityFed has already argued that OTS is not entitled to a cease and desist order under §1818(b)(1), claiming that it has neither violated a condition imposed in writing nor a written agreement with OTS. See CityFed's Amended Answer at 2-3, 7. There is therefore no prejudice to CityFed by the amendments.

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2. In any event, if the holding in *Wachtel* is deemed to preclude every order to cease and desist that wil ultimately result in the payment of money, OTS has not acquiesced in that ruling.

Appendix C

CONCLUSION

Based on the foregoing, this tribunal should grant Enforcement's motion for leave to file an Amended Notice of Charges and to permit Enforcement to supplement its summary disposition papers, such additional filings being herewith submitted, as part of the proceeding initiated by OTS Order No. AP 94-26 (June 2, 1994)

Dated: November 30, 1995

Respectfully submitted

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s/ Richard F. Riese
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Supreme Court, U.S.
FILED
DEC 27 1995
CLERK

No. 95-738

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION, PETITIONER

v.

ROBERT D. RAPAPORT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1995

NO. 95-738

UNITED STATES DEPARTMENT OF THE TREASURY, OFFICE OF THRIFT SUPERVISION, PETITIONER

v.

ROBERT D. RAPAPORT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. The OTS's consistent position has been that a financial institution insider is "unjustly enriched" within the meaning of 12 U.S.C. 1818(b)(6)(A)(i) when he enters into a written agreement with federal bank regulators *in exchange for some valuable regulatory benefit*, and then—having received and retained that benefit—fails to abide by his side of the bargain. See, *e.g.*, Pet. App. 66a & n.29. That interpretation is consistent with traditional equitable principles of "unjust enrichment." See Pet. 14 n.2. If it diverges from those principles, it does so only with respect to the statutory remedy, which the OTS has reasonably concluded may be measured by the amount that a defaulting insider promised to pay in exchange for

a valuable, but not easily valued, regulatory benefit. As the petition argues (see Pet. 14-15), that conclusion is supported both by the other terms that Congress used in the same provision, and by the overall structure and purpose of Section 1818(b).[1]

Respondent makes little effort to answer our arguments (Pet. 8-15) that the OTS has reasonably interpreted the statutory phrase "unjustly enriched" to cover situations like his. He argues primarily that, if the agency's interpretation is correct, "the term 'unjustly enriched' * * * will have no meaning whatsoever, since every dispute involving a failure to pay money would then be a candidate for an administrative resolution." Br. in Opp. 3; see also *id.* at 5-6, 10-11 & n.4. That argument rests on respondent's incorrect assertion that, in the OTS's view, "fail[ure] to make a monetary payment under the terms of a net worth maintenance agreement * * *, *by itself*, constitute[s] unjust enrichment." Br. in Opp. 2 (emphasis added). The OTS, however, has argued only that an insider like respondent is "unjustly enriched" if he (i) refuses to pay money in violation of a previous agreement, (ii) *after receiving*, in exchange for that agreement, *a valuable benefit*—the provision of federal deposit insurance to his new savings institution—that cannot be either returned or readily valued. That position does not deprive the term "unjustly enriched" of

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[1] This Court recently reiterated the general proposition that Congress may be presumed to have intended to adopt a common-law understanding of undefined statutory terms, "unless the statute otherwise dictates." *Field* v. *Mans*, 116 S. Ct. 437, 443 (1995). A statute may "otherwise dictate[]," not only through an explicit statutory definition, but by inference from a word or phrase's "placement and purpose in the statutory scheme," because "[t]he meaning of statutory language, plain or not, depends on context." *Bailey* v. *United States*, No. 94-7448 (Dec. 6, 1995), slip op. 8.

any meaning, or sanction the use of orders under Section 1818(b)(6) to resolve every monetary dispute.

2. Respondent argues (Br. in Opp. 4, 7-8) that the decision in this case does not conflict with the Fifth Circuit's decision in *Akin* v. *OTS*, 950 F.2d 1180 (1992), because the facts of the two cases are not precisely the same. Respondent contends, for example, that Akin controlled the institution whose net worth he promised to maintain, whereas respondent, although he owned 70% of the stock of Great Life Savings Association (Great Life), "did not control" it. Br. in Opp. 4. That contention is not only factually questionable, see Pet. App. 57a n.23, but legally irrelevant. Both Akin and respondent owned more than 25% of the voting stock of their respective institutions, and both were therefore "institution-affiliated part[ies]" subject to the banking agencies' cease-and-desist jurisdiction under 12 U.S.C. 1818(b)(1). See 12 U.S.C. 1813(u) and (w)(5), 1817(j)(8)(B), 1841(a)(2)(A). Nothing in *Akin* indicates that the court there relied on the details of Akin's position in concluding that he was "unjustly enriched," within the meaning of Section 1818(b)(6)(A)(i), by breaching his agreement to maintain the net worth of his institution, or that the Fifth Circuit would have thought this case distinguishable from *Akin* on any such basis. See also Pet. App. 67a n.30.

Respondent also argues that Akin "derived an immediate personal benefit from the [OTS's] forbearance from pursuing a cease-and-desist action that threatened [Akin's] control" over his institution, whereas respondent "did not receive any personal benefit" in return for his agreement to maintain Great Life's net worth. Br. in Opp. 4; see *id.* at 8. Here, however, just as in *Akin*, respondent clearly received something of value in exchange for the net worth maintenance commitment he later breached. Respondent sought federal deposit insur-

ance for a new savings association, in which he planned to be the majority investor. Pet. App. 36a. Federal banking authorities made insurance available, but only on the condition that respondent personally agree to maintain the new association's capital for five years. *Id.* at 2a. Respondent was enriched when his new business received the federal insurance that allowed it to begin operating, so that respondent could earn a return on his investment. His enrichment became "unjust" when he refused to honor his capital maintenance agreement, on which the provision of federal insurance had been explicitly predicated. Those facts do not distinguish this case from *Akin*. See 950 F.2d at 1184.

The decision below also conflicts with *Akin* as to the permissible measure of recovery under Section 1818(b)(6)(A). See Br. in Opp. 8. In this case, as in *Akin*, the OTS concluded that when an insider retains money that he promised to dedicate to the support of his institution or its creditors (including the federal deposit insurance fund), the amount promised but unpaid is one fair measure of the amount by which he has been "unjustly enriched" within the meaning of the statute. Pet. App. 65a-67a. The court in *Akin* accepted that contention, and affirmed "in all respects" an order entered on that basis. 950 F.2d at 1184, 1186. See also *Cavallari* v. *Office of Comptroller of the Currency*, 57 F.3d 137, 144 (2d Cir. 1995); *Simpson* v. *OTS*, 29 F.3d 1418, 1425-1426 (9th Cir. 1994), cert. denied, 115 S. Ct. 1096 (1995). There is no merit to respondent's suggestion (Br. in Opp. 8) that the Fifth Circuit did not decide the remedial issue, or that the matter is not ripe for resolution by this Court.

3. Respondent only briefly defends (Br. in Opp. 11-12) the court of appeals' holding that it owed no deference to the OTS's interpretation of Section 1818(b). Respondent

argues primarily (Br. in Opp. 9-15) that that holding is irrelevant here, because the statutory language at issue is "clear and unambiguous" (*id.* at 9).[2] As both the petition (at 8-17) and the conflicting decisions in this case and in *Akin* (see 950 F.2d at 1183-1184) demonstrate, however, the proper application of Section 1818(b) to the facts of this case is a matter over which reasonable minds can and do differ. It is in precisely such situations that deference to an administrative agency's interpretation is required. See, *e.g.*, *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2159-2162 (1993).

In addition, the court of appeals' refusal to accord any deference to the OTS's statutory interpretations conflicts with the practice of other courts of appeals. See Pet. 21. Respondent argues (Br. in Opp. 12-14) that there is nevertheless no conflict because the courts that have deferred to administrative interpretations in this context have not discussed the position adopted by the court of appeals in this case. The fact that other courts have not explicitly rejected the D.C. Circuit's novel argument for refusing deference does not, however, resolve the conflict or lessen the importance of the error below. The importance of that error is, moreover, magnified by the fact that it was made by the court in which "the vast majority of challenges to administrative agency action are brought." *Vermont Yankee Nuclear Power Corp.* v.

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[2] Respondent suggests (Br. in Opp. 10-11) that the court of appeals would have proceeded in the same manner, and reached the same result, whether or not it thought that the OTS's interpretations were entitled to deference. Only Judge Rogers' concurrence, however, took that position. Pet. App. 24a. The panel majority dealt with the question of deference as a threshold matter (see *id.* at 10a), and explicitly held that, because it owed "no * * * deference" to the agency's interpretation (*ibid.*), it would "proceed de novo" (*id.* at 11a).

Natural Resources Defense Council, Inc., 435 U.S. 519, 537 n.14 (1978).

4. Respondent dismisses the OTS's argument that its order in this case should be upheld without regard to the "unjustly enriched" language of Section 1818(b)(6)(A)(i) (see Pet. 15-18) as "linguistic sleight of hand." Br. in Opp. 16. As the petition points out (at 16), however, Section 1818(b)(6) relates only to orders that go beyond the agency's core cease-and-desist authority and order a party "*further*, to take affirmative action to correct the conditions resulting from any * * * violation or practice." 12 U.S.C. 1818(b)(1) (emphasis added). The order at issue in this case did not need to rely on that "affirmative action" authority.

Section 1818(b)(1) gives the OTS the authority to order a party to "cease and desist from [a] * * * violation" of a "condition imposed in writing by the agency in connection with the granting of any application or other request by the depository institution" or of a "written agreement entered into with the agency." Respondent's failure to honor his net worth maintenance agreement violated both a condition imposed in writing and a written agreement. Thus, whatever limitations subsection (b)(6) may place on agency orders that require insiders to take additional "affirmative action" to correct the "conditions resulting from" their violations, those limitations do not apply to the order issued to respondent, which simply required him to cease and desist from the violation itself.

Respondent attacks our argument as "a play on words" (Br. in Opp. 17), because an order to stop violating an agreement to pay money is, in effect, an order to pay the money owed. Respondent argues that such an order is therefore an order to take "affirmative action," subject to the limitations of subsection (b)(6). Precisely

the same objection could be made, however, to any cease-and-desist order that directs a party to take some positive action necessary to comply with a statute or regulation, safe banking practice, or a written condition or agreement. Treating all such orders as orders requiring "further * * * affirmative action" would disserve Congress's intent in creating the broad cease-and-desist authority conferred by Section 1818(b)(1). Compare Br. in Opp. 17 with *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311-312 & n.17 (1963) (agency's "cease and desist" authority included power to compel divestiture).

Our interpretation of the banking agencies' core cease-and-desist authority does not render the "affirmative action" provisions of the statute "meaningless." Br. in Opp. 18. Where, as here, an insider has reneged on an express written agreement to pay money, he will have violated that agreement, which may be enforced under the agency's core cease-and-desist powers. Typically, he will also have damaged the institution and been "unjustly enriched" under Section 1818(b)(6)(A). In cases involving no written condition or agreement calling for the payment of money, however, an order to desist from the violation would not itself entail any remedial payment. In such cases, the agency could generally order such a payment only as a matter of "affirmative relief," subject to the limits of subsection (b)(6).

Respondent contends (Br. in Opp. 18-23) that the OTS waived any argument based on its core cease-and-desist authority by failing to raise that argument before the court of appeals in this case. The argument does not, however, present a "new claim" in this case; it is, rather, "a new argument to support * * * [the OTS's] consistent claim" that it has the authority under Section 1818(b) to order respondent to comply with his net worth

maintenance agreement. *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995). There would, in addition, have been no point in raising the argument before the D.C. Circuit, which had already made clear, in *Wachtel* v. *OTS*, 982 F.2d 581, 586 (1993) (emphasis added), its broad and unqualified position that "the government *simply cannot make a monetary claim* against [an institutional insider] under § 1818 without meeting the prerequisites of § 1818(b)(6)(A)."[3] See *Lebron*, 115 S. Ct. at 965; *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992).

The decision below explicitly reaffirms *Wachtel*'s holding that, in order to issue an order of the sort involved here, the OTS "must show" that the facts of the case satisfy one of the conditions set out in Section 1818(b)(6)(A). Pet. App. 9a; see also *id.* at 19a ("The OTS has the authority * * * to enforce a capital maintenance or other agreement in an administrative proceeding only against a party who has either been unjustly enriched or has acted with reckless disregard for some aspect of federal regulation."). The court of appeals has thus twice "expressly decided" the first question stated in the petition, and that question is properly presented in this case. See *United States* v. *Williams*, *supra*; *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Stevens* v. *Department of Treasury*, 500 U.S. 1, 8 (1991).

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[3] In *Wachtel*, the OTS argued broadly that Section 1818(b)(1) "expressly provides that the Director may enforce written conditions imposed in connection with approval of an application." 91-1580 OTS Br. 42 (D.C. Cir.). The agency argued that an order requiring compliance with a net worth maintenance agreement could be entered in reliance solely on Section 1818(b)(1), without regard to subsection (b)(6). See, *e.g.*, 91-1580 OTS Br. 48. The court of appeals squarely rejected that claim.

5. Finally, respondent argues (Br. in Opp. 4-7) that this case does not warrant this Court's review because the decision below will not preclude federal bank regulators from enforcing net worth maintenance agreements in actions for contract damages. Although the OTS has the general authority to sue in federal court, see 12 U.S.C. 1464(d)(1)(A), the "condition[s] imposed in writing" and "written agreement[s]" that Congress intended to be administratively enforceable through Section 1818(b)(1) will not necessarily be enforceable as contracts under state or federal common law. See cases cited at Br. in Opp. 5; see also *Groos Nat'l Bank* v. *Comptroller of the Currency*, 573 F.2d 889 (5th Cir. 1978). Even where contract actions are possible, respondent's reading of the statute would seriously compromise the strong federal interest in prompt and appropriate administrative remedies that initially motivated the enactment of Section 1818(b)'s cease-and-desist authority. See, *e.g.*, S. Rep. No. 1482, 89th Cong., 2d Sess. 5 (1966) ("Experience has often demonstrated that the remedies now available to the Federal supervisory agencies are * * * too cumbersome to bring about prompt correction and promptness is very often vitally important.").

The adverse effects of the decision below are important. As the petition notes (at 23), a significant number of net worth maintenance agreements are outstanding, and additional agreements of this kind may be entered into in the future. Nor is the decision below limited either to those agreements or to the OTS. Every subject of an agency action under Section 1818(b) may seek review in the D.C. Circuit, and the decision below therefore affects all four federal banking agencies. Moreover, Section 1818(b) controls the administrative enforcement of all regulatory conditions "imposed in writing" by, and all "written agreements" with, any of

those agencies. Thus, as discussed in the petition (at 24), the decision below inappropriately restricts the remedial options open to all four federal banking agencies in cases in which an institution-affiliated party has violated a written agreement imposing obligations beyond those created by statute, regulation, or prior agency order.

Congress has made clear that it considers the administrative use and enforcement of written conditions and agreements, including net worth maintenance agreements, to be an important part of the regulatory system. See 12 U.S.C. 1818(b)(1) (providing for enforcement); 11 U.S.C. 365(*o*) and 507(a)(9) (making special provision for the enforcement of net worth maintenance agreements in bankruptcy); see also *In re Firstcorp, Inc.*, 973 F.2d 243 (4th Cir. 1992); cf. 12 U.S.C. 1831o(e) (providing for the use and enforcement of "capital restoration plans" for undercapitalized institutions). The decision below places unjustifiable limits on the ability of federal regulators to enforce such written obligations.

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For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1995